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DROIT DE SUITE:
THE ARTIST'S RESALE ROYALTY

DECEMBER 1992

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A REPORT OF THE
REGISTER OF COPYRIGHTS





The Register of Copyrights
of the
United States of America

December 1, 1992

(202) 707-8350

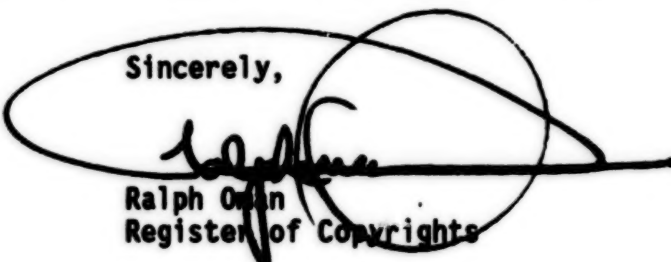
Library of Congress
Department 17
Washington, D.C. 20540

Dear Mr. Vice President:

I have the honor of sending you a copy of the Copyright Office's report on droit de suite, the resale royalty right for visual artists. As required by section 608(b) of the Visual Artists Rights Act of 1990, I have studied the feasibility of implementing such a royalty in the United States, considering the testimony, comments, and scholarly literature of various experts, as well as the experience of California, France, Germany, and Belgium with droit de suite.

I would be pleased to elaborate on any aspect of the report.

Sincerely,


Ralph Oman
Register of Copyrights

The Vice President
President of the Senate
United States Senate
S-212 The Capitol
Washington, D.C. 20510

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17 USC 106A
note.

SEC. 608. STUDIES BY COPYRIGHT OFFICE.

* * * * *

(b) STUDY ON RESALE ROYALTIES.—

(1) NATURE OF STUDY.—The Register of Copyrights, in consultation with the Chair of the National Endowment for the Arts, shall conduct a study on the feasibility of implementing—

(A) a requirement that, after the first sale of a work of art, a royalty on any resale of the work, consisting of a percentage of the price, be paid to the author of the work; and

(B) other possible requirements that would achieve the objective of allowing an author of a work of art to share monetarily in the enhanced value of that work.

(2) GROUPS TO BE CONSULTED.—The study under paragraph (1) shall be conducted in consultation with other appropriate departments and agencies of the United States, foreign governments, and groups involved in the creation, exhibition, dissemination, and preservation of works of art, including artists, art dealers, collectors of fine art, and curators of art museums.

(3) REPORT TO CONGRESS.—Not later than 18 months after the date of the enactment of this Act, the Register of Copyrights shall submit to the Congress a report containing the results of the study conducted under this subsection.



The Register of Copyrights
of the
United States of America

Library of Congress
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Washington, D.C. 20540

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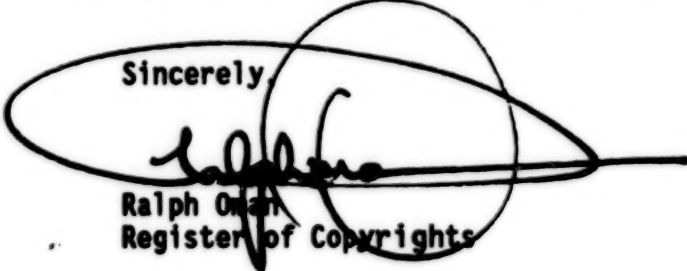
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Ralph Omar
Register of Copyrights

The Honorable
Thomas S. Foley
Speaker of the House of
Representatives
Office of the Speaker
H-204 The Capitol
Washington, D.C. 20515

* * * * *

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This report was written by the following principal contributors, and I want to thank them personally for their herculean effort:

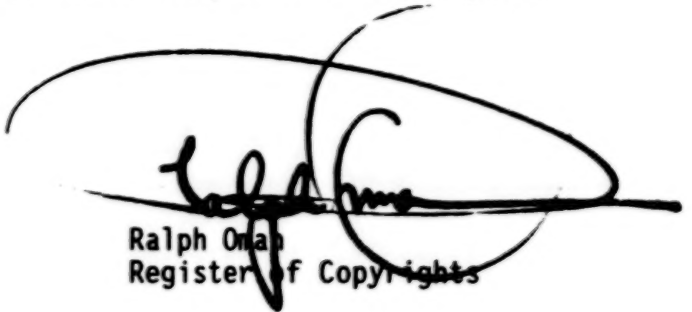
CONTRIBUTORS

Dorothy Schrader	General Counsel
Marilyn Kretsinger	Assistant General Counsel
Elliott Alderman	Senior Attorney Advisor
Jennifer Hall	Attorney Advisor

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And, in conclusion, I would like to thank William F. Patry, Counsel to the House Subcommittee on Intellectual Property and Judicial Administration, for the important pioneering work he did on this study while he served in the Copyright Office as Policy Planning Advisor to the Register of Copyrights.



Ralph Oniah
Register of Copyrights

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**Droit De Suite:
The Artist's Resale Royalty**

EXECUTIVE SUMMARY

Introduction:

On December 1, 1990, President Bush signed into law the Visual Artists Rights Act of 1990 [VARA], which became generally effective on June 1, 1991, and grants to visual artists certain moral rights of attribution and integrity. Section 608(b) of that legislation requires the Register of Copyrights, in consultation with the Chair of the National Endowment of the Arts, to study the feasibility of implementing a resale royalty on the sale of works of visual art.

The Copyright Office consulted with the National Endowment of the Arts (NEA), and NEA provided the Office with suggested arts organizations that should be contacted in the course of this study. Subsequently, the Copyright Office issued a Notice of Inquiry requesting public comment on enactment of a federal resale royalty. In particular, the Office sought comment from artists, art dealers, auction houses, investment advisors, fine art collectors, and art museum curators. The Copyright Office also published a second Notice of Inquiry announcing that it would continue its investigation of resale royalties for artists by holding two public hearings, one in San Francisco, on January 23, 1992, and another in New York, on March 6, 1992. Both Notices of Inquiry focused principally on seven significant areas where adopting a federal resale royalty would affect U.S. law and the art community: the potential effect on creation of new works and the existing art market; the form of, beneficiaries of, and term of the right; enforcement and collection mechanisms; whether the right should be

waivable and alienable, and whether the California law should be preempted by federal law.

The Office's study has two parts. The Report itself sets out what the Office found in examining and assessing all of the available data on the issue of whether or not the benefit to visual artists from a royalty on the resale of their works will outweigh any increased cost and potential decreased purchases of works of contemporary art. The Appendix to the Report contains the transcripts of the two public hearings and the comment letters.

I. The Foreign Experience With Droit de Suite

Like Puccini's "La Boheme," which opened with an artist and a poet shivering in a Paris garret, the droit de suite grew from a European, particularly French, awareness of the state of affairs of struggling artists at the turn of the century.

Today, the droit de suite -- the right of an artist to collect a part of the price paid when a work is resold -- is based on the premise that visual artists are entitled to participate in an increase in the value of their works in ways that are not otherwise adequately addressed by copyright law.

The copyright law's rights of reproduction and distribution are better suited to exploitation of literary or musical works. A visual artist's expression is usually embodied in an end product, sold to a single purchaser. The artist's current work and reputation continue to affect the value of that earlier work. Many European countries, in the event of resale, allow artists to benefit from any increase in value in their works.

In 1920, France became the first country to recognize the droit de suite. Today, some 36 countries have the resale royalty, and several other countries are considering legislation to enact it. Roughly half of the countries

that now purport to have droit de suite, however, lack implementing legislation. The level of commitment and the characteristics of the national laws vary widely.

There have been efforts to standardize the resale royalty. Some observers argue that the droit de suite's survival depends on its internationalization. The Berne Convention for the Protection of Literary and Artistic Property contains statements of principle in favor of the droit de suite. The European Community has directed a study of the droit de suite that may lead to its harmonization.

Whether the droit de suite will make the transition from an idealistic notion to an international norm depends both on commitment to droit de suite and creation of practical means to implement the goal of allowing artists to share in the profit of their work once it has left their hands.

Those countries that have most successfully implemented the droit de suite share certain characteristics. In France, Germany, and Belgium, for instance, the royalty is collected on the total resale price of the work. Measuring the royalty by the resale price departs from the rationale of allowing artists to participate in an increase in value, but is considered simpler and more practical. The difficulty in administering a royalty based on the difference between the purchase price and resale price may explain the law's disuse in countries such as Italy and Czechoslovakia.

Auctions are the minimum field of application in all countries which have adopted the droit de suite, because auctions sales are easiest to monitor. Including dealer sales increases the administrative challenge and the risk of noncompliance. The French law originally applied only to sales at auction, and Belgium has preserved this limitation. In 1957, France extended its law to sales "through a dealer," but implementing rules never having been issued, the law

still applies in practice only to sales at auction. The French galleries do, however, make payments to an artist's social security. The German law requires a royalty on both auction and dealer sales, but in reality, Bild-Kunst collects a flat percentage of gallery revenue paid partly to artists qualifying for droit de suite, and partly to an artists social security fund.

Although the droit de suite is inalienable and non-waivable, in almost all effective systems it may be transferred for purposes of collection through an artists' collecting agency.

The collection of the droit de suite through authors' societies is considered essential to a successful resale royalty. Only those countries with active and efficient national authors' societies, such as SABAM in Belgium, Bild-Kunst in Germany, and SPADEM and ADAGP in France, have effectively implemented the droit de suite.

In addition to discussions within the European Community that may result in harmonization of droit de suite, there have been other recent studies and international conferences where droit de suite has been discussed as one way to improve the artist's economic status.

II. The U.S. Experience With the Artists' Resale Royalty

The concept of droit de suite was introduced in Paris in the 1920's, and there have been efforts to realize this European concept in the United States since as early as 1940. In the early 1960's, proposals were made to incorporate droit de suite into state or federal law in the United States. To date, only California's efforts have resulted in law. The proposals for a federal law have engendered a great deal of controversy. The European models have had varying

degrees of success, and Congress requested this study to determine the feasibility of implementing an effective resale royalty in the United States.

The first efforts to gain such a right in this country were made by individual artists, writers, or lawyers who pressed for a resale right through art unions, art journals, or private contracts for sales of art works. In 1940 artist Grant Woods attempted to get fifty percent of the appreciated value on resale via a contract after one of his earlier paintings quadrupled in value in a short period. Opinions differ as to whether such contracts can bind subsequent purchasers of art works without some sort of public registry.

These individual efforts were kicked into high gear in this country by a well-publicized auction at which collector Robert Scull sold for \$85,000 a Robert Rauschenberg painting he had purchased for less than \$1000 a decade or so earlier.

The State of California passed a resale royalty law in 1976. The law mandates a five percent royalty of the resale price to the artist when a work is resold in California or resold anywhere by a California resident. Several artists report significant financial gain under the law. However, the law is widely criticized as underused and underenforced, and a 1986 survey of California artists and dealers was inconclusive. Some commentators claim that the law places California's art market at a competitive disadvantage, but others say that it has had no effect on the California market.

Some commentators maintain that the law is preempted under the federal copyright law. The California law withstood a preemption challenge under the 1909 Copyright Act, but cases and commentary since then have suggested a different result under the 1976 Copyright Act. Any state resale royalty scheme may be preempted under section 301 of the 1976 Act because it inhibits the

section 106 distribution right as modified by the section 109 "first sale" doctrine (which allows the owner of a lawfully-made copy, including an original, to dispose of that copy as he or she pleases). Given potential problems of preemption, enforcement, and multiple application, any droit de suite that is enacted in the United States should be at the federal level.

Since the mid-1970's, several bills have been introduced in Congress regarding resale royalties and moral rights for visual artists. In 1978, Representative Henry Waxman introduced legislation calling for a five percent royalty of the gross sales price of works sold in interstate or foreign commerce for \$1000 or more. In 1986 and 1987, Senator Edward Kennedy and Representative Edward Markey sought a seven percent royalty of the appreciated value - the difference between the purchase and resale price. Instead of private artists' rights societies to collect royalties, both the Waxman and Kennedy-Markey proposals relied on government agencies to enforce the droit de suite. The Waxman bill would have created a National Commission of the Visual Arts to register works and collect royalties. The Kennedy-Markey proposal required artists and sellers to register with the Copyright Office. The Kennedy-Markey bills also would have granted limited moral rights of paternity and integrity.

After United States adherence to the Berne Convention, the Congress reexamined moral rights for authors and decided to address the issue of moral rights for visual artists separately. Under the Visual Artists Rights Act of 1990, certain moral rights were integrated into the copyright law. Proposals for droit de suite failed to garner consensus. Instead, the new law directed the Copyright Office to conduct a study on the feasibility of implementing an effective resale royalty in this country.

III. Analysis of Written Comments and Hearings

The Visual Artists Rights Act of 1990, signed into law by President Bush on December 1, 1990, grants to visual artists the moral rights of attribution and integrity. The law also requires that the Register of Copyrights, in consultation with the Chair of the National Endowment for the Arts, study the feasibility of implementing a resale royalty on the sale of works of visual art.

Pursuant to this mandate, the Copyright Office consulted with the NEA and published a Notice of Inquiry seeking public comment on significant questions posed by droit de suite. The Office also held two public hearings. However, the Office did not conduct an independent empirical study, and the administrative record contains insufficient empirical evidence comparing the respective remuneration of visual artists and other creators. Most commentators espoused the grant of resale royalties, maintaining that visual artists are treated differently than other creators under the copyright law. A vocal minority, including some artists, opposed the grant of resale royalty rights. Some of those who favored the resale royalty in principle made suggestions for improving the application of the California system.

Public comment was split on the question of whether royalties would provide an incentive for the creation of new works. Some argued that increased revenue would encourage further creation, while others maintained that artists create for other than financial reasons. Still others said that, in any event, royalties are too remote and uncertain to encourage creation.

There was similar disagreement on the anticipated effect of royalties on the marketplace. On the one hand, it was said that royalties would be like other costs associated with art transactions, and would have little or no effect

on the market. Others warned, though, that the application of royalties would damage an already depressed art market.

Commentators also disagreed on the relevant categories of works that should be covered by the royalty. They also varied considerably--from two hundred to five thousand dollars -- in the threshold amount suggested to trigger the royalty. But almost all commentators stated that the royalty should be applied regardless of whether a work increased in value.

With respect to the suggested recipients of the royalty and the international implications of granting the right, some commentators declared that royalties should be extended to foreign artists whose works are sold in the United States. Others maintained that either U.S. citizenship or residency should be required, whether or not the work was created here. Most agreed, however, that the royalty right should be coextensive with the term of copyright protection.

There was less unanimity about whether the right should be applied retroactively. Berne Convention reciprocity was the principle argument advanced in favor of retroactivity. But there was disagreement about whether royalties should apply to works in existence at the date of enactment of the legislation or to works protected in the country of origin at that time. Some opposed retroactivity generally.

Concerning the issue of administration and collection of the royalty right, commentators pointed to the California experience with private enforcement and recommended the European approach of collective administration of royalties. In California, artists were concerned with enforcing their rights, litigation expenses, and the fear of retribution after demanding royalties from sellers and galleries. In France, by contrast, the country most familiar with monitoring and

collecting the royalty, the right is handled by agreement between auction houses and artist collection societies.

Even though most believed that the right was best administered collectively, there was disagreement about the need for a registration requirement. Some suggested some form of art registry, but opponents were concerned about the privacy interests of parties to art transactions in not having their purchases and sales prices made public.

Most agreed, in any event, that the royalty should not be applied to gift transactions, although some felt that a barter arrangement -- as opposed to an outright sale -- should trigger the royalty.

Except to enforce collection, there was strong opposition to making the royalty right either waivable or alienable, lest young artists be pressured into waiving their rights. Advocates of free alienability countered that a non-waivable right interfered with contractual freedom, and that such a right was necessary to encourage the risky purchase of works of young artists.

Finally, all commentators favored preempting California's law, if a national resale royalty law was passed. One suggested, however, that states should be free to provide greater levels of protection than the federal minima.

IV. Integration of the Resale Royalty into U.S. Law

Advocates of the resale royalty right point to the difference in the copyright law's treatment of fine visual artists, on the one hand, and authors and composers, on the other, to justify the payment of a royalty to the artist on the resale of his creations. The principle benefit of copyright, it is argued, is to authors who exploit multiple copies of works through either reproduction or performance. Fine visual artists cannot fully avail themselves

of these economic rights, since they create in unique or limited copies and their principal means of exploiting their intellectual property rights are through the sale of their works or public display. The former is usually a one-time right, while the latter is extinguished through the First Sale doctrine, or limited by the competing displays of owners of copies or, in the case of unique works, the physical reality that only one person can display the same work at one time.

Yet it is argued that the comparison between paintings and sculptures, for example, and books and sound recordings, is inapposite. Although authors who create numerous copies can reap the benefits of multiple exploitations of their works, they also have to sell a large number of copies because they make such a small royalty on each one. The value of works of art, on the other hand, is determined by scarcity and artists do not require the same level of demand to secure a living. It is also not clear that the substitution of one owner of a painting for another is an additional exploitation of the work, as is the case with the sale of another copy of a book or sound recording.

Because the Copyright Office lacks hard data and quantifiable experience to make such a comparison, however, it cannot compare the respective remuneration of artists and other creators with any empirical certainty. Instead, it must base its conclusions on anecdotal evidence and existing literature, with the attendant imprecision.

Some argue that, consistent with one of the constitutional purposes of copyright, the potential for increased remuneration is a potent incentive for creation. Yet there is evidence that resale royalties benefit only a very small percentage of artists and will depress prices for works in the primary market, possibly chilling rather than stimulating the incentive to create. When all is

said and done, though, the royalty may be absorbed, like other costs associated with art transactions, without causing a ripple in the art market.

Even assuming that the U.S. Copyright Act does discriminate against fine visual artists, the resale royalty does not appear to be the best way to level the playing field. The United States is a member of the Berne Convention and provides moral rights to visual artists, but the notion of an encumbrance attaching to an object that has been freely purchased is antithetical to our tradition of free alienability of property.

Moreover, the royalty also raises significant privacy concerns with art transactions, since artists would need to obtain information about sales prices and ownership that sellers, purchasers and others may not want to disclose.

And though the point is subject to disagreement, there is some evidence that the royalty has had an adverse effect on the art markets of several countries and the State of California. Most significantly, the effectiveness of the royalty depends on the frequency of resales within the designated period, and there is no clear evidence that these occur with any regularity.

Indeed, even in the countries that support royalties and have had experience applying them, the administration of the right has been fraught with problems. In France, the birthplace of the concept, the royalty is applied to the total sales price of works of art, departing from the principled rationale of permitting artists to participate in the increased value of their works, and introducing an additional note of unfairness, since artists share only in increases and not losses in the value of their works. Moreover, the droit de suite is applied only to auction houses, even though one estimate is that as many

as four times the number of sales occur through galleries and private transactions.

The German approach to resale rights reasons that the increased value of a work was always latent in it and is due to the artist's continuing work. Market forces, rather than any metaphysical concept, drive the price and terms of an exchange and determine value. In a free market, there is arguably no latent value of an object, rather it is only as valuable as the price a willing buyer will pay a willing seller at a given time. There are also factors other than the continuing efforts of the artist that raise the value of a work. In addition, even though the application of the royalty to increases in the value of works, rather than the total sales prices, is much fairer, the complexity of calculations make a royalty based on appreciation difficult to implement.

The Belgian approach, based on the contract principles of changed circumstances and unjust enrichment, shares many of the same shortcomings. The putative enrichment is based on a contract between a willing seller and buyer that was legitimate at the time of the transaction. It is only later when the work increases in value that the price becomes insufficient. And for unjust enrichment to be two-sided and truly equitable, the seller would have to be permitted to deduct the costs of resale and ownership.

Moreover, even aside from the inherent problems of the resale royalty, some argue that it does not fit within our economic system. The royalty may encumber future sales and depress the art market. And to the extent that works of visual art can be substituted readily by another commodity, patterns of demand are altered and prices and sales volume are reduced. It also may be argued that artists do not take full advantage of their reproduction rights. And because almost all works of living artists decline in value, and purchasers are

not permitted to deduct these losses on their taxes -- even though any gains are fully taxable -- an additional levy on the resale of art works may be viewed as a deterrent to, rather than an incentive for, the collection of modern art.

V. Conclusions and Recommendations

In Europe, author's rights have evolved around the recognition that intellectual creations, particularly in art, deserve special protection. Droit de suite, which developed in Europe, derives from the moral right of paternity, connecting authors with their creative progeny, even after alienation of the works. From this perspective, artists benefit as a matter of equity, not welfare, from increases in the value of their fine art. Such increases, it is believed, are based on the artist's continued work, and purchasers should not be unjustly enriched through the artist's continued evolution.

In the United States, on the other hand, copyright legislation is grounded in the constitutional clause, which motivates creativity, while encouraging the broad public dissemination of works. In U.S. copyright law, works created in numerous copies are commercially exploited by the indirect communication of a copy to the public, through either reproduction or performance. A critical value of fine art lies in its uniqueness. Visual artists are paid only for the initial sale of their works and have limited markets for the exploitation of their reproduction rights. Some argue that the U.S. copyright law, which is driven typically by economic exploitation of many copies, has failed to provide economic incentives for fine visual artists who create works in unique or limited copies. Because of the First Sale doctrine, artists also lose their potentially most remunerative right -- that of public display -- once they sell their creations. Reasoning that other authors have an easier time exploiting their works through copyright, advocates justify the

resale royalty as the artist's compensation for the lack of a marketable reproduction right.

Although authors who do not create unique works can produce numerous copies or license numerous performances and reap the benefits of continued royalties, the value of works of fine art is determined in part by scarcity and the art does not require the same level of demand to secure a living for the artist. Indeed, in this respect, even though fine artists cannot avail themselves optimally of reproduction rights, it may be argued nevertheless that the copyright scheme favors such artists who have fewer works to market. Moreover, successful artists -- who typically will garner more income from droit de suite -- secure ever increasing prices as their reputations grow and they sell successive works.

Undoubtedly, the enhanced reputation of a creator has a positive effect on future sale prices for every kind of authorship. Some other countries try to even out disparities when an artistic work appreciates a great deal after the initial sale, but it is not clear how successful these efforts have been.

Although several European authorities maintain that the royalty has not adversely affected their art markets, others maintain that the presence of the royalty has hindered several European art markets. It is not clear what conclusions can be drawn from the California experience. Evidence is inconsistent about the extent to which the resale has affected sale of contemporary art in California, and the number of sham sales which have been shifted to other jurisdictions. On the other hand, it is clear that the California resale right has not been fully realized.

The argument is also made that the royalty benefits only successful, well-established artists, and that most artists, who lack a resale market, will

suffer in the primary market as prices are depressed, anticipating the future royalty payment.

The usefulness of the royalty depends, as well, on the creation of the type of art that Congress wants to encourage. To be effective the droit de suite must be an incentive to produce works that will be resold -- ideally, easel paintings and traditional sculpture, where conception is embodied in a single object, or a very few copies.

Implementation of the royalty would require the qualification of the First Sale doctrine. The copyright law recognizes a distinction between a work and its material embodiment. This separation largely disappears, however, when a work is created in unique form. Once a collector has purchased an original painting, for example, the artist no longer possesses either the work or the object to display, whether or not he or she has retained his copyright. And even if the artist creates several copies of a work, he or she must compete with the copy owner's right of public display.

Based on its analysis of the foreign and California experience with droit de suite, the administrative record, and independent research, the Copyright Office is not persuaded that sufficient economic and copyright policy justification exists to establish droit de suite in the United States. Neither the administrative hearing process nor independent research supplied the Office with sufficient current empirical data. Therefore, the Office could not accurately compare the respective remuneration of authors who create in many, and artists who create in limited, or unique, copies. Any conclusions that we could make about the number of artists who would benefit from the resale royalty would be based on anecdotal evidence and limited sample size. Most significantly, there is no clear evidence indicating the frequency of resale of works of fine

art. Thus, even if Congress determines that the Copyright Act does treat fine visual artists in a manner less favorable than authors or composers, it is not clear that the resale royalty right is the best means to offset this disadvantage, particularly if it is not triggered with any frequency within the copyright term.

The international community is now focusing on improving artists' rights, including the possibility of harmonization of droit de suite within the European Community. Should the European Community succeed in harmonizing existing droit de suite laws, Congress may want to take another look at the resale royalty, particularly if the Community decides to extend the royalty to all its member States.

Many countries currently offer alternative solutions to improve artists rights that the United States might want to consider. Although the Copyright Office does not necessarily endorse any alternative solution, Congress might want to consider these alternatives:

1. **Broader Public Display Right**

Assuming that fine visual artists cannot exploit their intellectual property rights adequately under the existing copyright law, some form of a broadened public display right might be an alternative to the droit de suite. Rather than depending on frequent resales within the specified royalty term, a considerable problem of the droit de suite, the display right would be triggered by the typical manner of exploitation of works of fine art -- public display. Museums and public art galleries might pay a fee to display works of art publicly.

In theory, section 106(5) of the Copyright Act already provides creators of pictorial, graphic and sculptural works with a public display right.

However, the right is cut off by the First Sale doctrine in section 109(c), that permits the owner of a copy to display his or her work publicly to viewers present at the place where the copy is located. Thus, with the sale of a unique work, the copyright owner is left with nothing to display, and with works created in limited copies the creator and object owner may mount competing displays.

2. Commercial Rental Right.

Under existing law, if a work of art is alienated solely by rental, the artist retains the exclusive distribution right. However, very few artists have the market power to structure the art transactions so that works are rented and ownership of the copy of the work does not pass to the purchaser.

Even with works that are sold, the Copyright Act could be amended to allow the distribution right to survive with respect to commercial rental. The owner of the copy would receive the object, while the artist would retain the right to exploit the work by commercial rental. Thus, the owner of the copy would pay the artist a royalty for any commercial rental of the purchased work.

3. Compulsory Licensing.

Another way to balance the interests of artists and collectors would be through some form of compulsory licensing and modification of section 109. Upon payment to an artist of the purchase price for a work and a licensing fee for public display, the owner of a copy would be free to display the work without having to negotiate terms with the artist.

4. Federal Grants and Art in Federal Buildings.

Congress could also encourage artists by increasing federal grants or by increasing funding for purchase of artworks for federal buildings.

C. MODEL DROIT DE SUITE SYSTEM

Should Congress determine that federal droit de suite legislation is the best way to help artists, the Copyright Office suggests consideration for the following model system.

1. Oversight of the Droit de Suite: Collection and Enforcement

The droit de suite has been effectively implemented only in those countries with active and efficient national authors' societies, such as SPADEM in France and Bild-Kunst in Germany.

Therefore, the Copyright Office suggests the Congress consider collective management of the droit de suite through a private authors' rights collecting society. The collection of art resale royalties would be handled on a direct or contractual basis, similar to collection of musical performance royalties by ASCAP and BMI.

The Office could serve a record-keeping function similar to the arts registry proposed in the Kennedy-Markey bills. Copyright Office records would be available to the artists' rights societies for purposes of collection, enforcement, and distribution. If a resale royalty were adopted in the United States, and particularly if it were extended to include dealer sales, the Office anticipates that a collection system with elements similar to the French or German systems would have the best chance of success.

2. Types of Sales

The Copyright Office suggests that, if a resale royalty is enacted in the United States, it should apply initially only to public auction sales. Auction sales are easiest to monitor. Including dealer sales -- or private sales, as proposed in the Waxman and Kennedy-Markey bills -- increases the administrative and enforcement challenge.

3. Measuring the Royalty

Based on the California and European experiences, a flat royalty of between three and five percent on the total gross sales price of the work seems most appropriate. There would be no need initially to set a threshold price to trigger the royalty mechanism if the royalty were applied initially only to auction sales, because auction sales usually deal in works with a minimum floor price. Similarly, there may be no practical need to legislate a floor price for dealer sales: Although one arts organization recommended a threshold resale price of as high as \$5000 to trigger the droit de suite, and Kennedy-Markey called for a threshold of \$1000, other groups called for figures as low as \$250 or \$500. Again, most art dealers trade only in works of at least that value, particularly in the resale market.

In those countries that have most successfully implemented the droit de suite, including France, Germany and Belgium, the resale royalty is measured on the total resale price. Measuring the royalty by the resale price departs from the rationale of allowing artists to participate in an increase in value, but is considered simpler and more practical. The difficulty in administering a royalty based on the difference between the purchase price and resale price may explain the law's disuse in countries such as Italy and Czechoslovakia.

Any resale royalty legislation could contain a rebuttable presumption that a work has increased in value between the time of purchase and resale. The purchaser/reseller would have the burden of proving to the collecting society that a work had not appreciated in value and that a royalty was not due.

4. Term

A term for the droit de suite coextensive with copyright seems appropriate. Under the current copyright law, this is life of the author plus

50 years. Should the European Community adopt a term for the droit de suite of life plus 70 years, there would be justification for similarly extending the term here.

The droit de suite would be descendible in a manner analogous to copyright.

5. Foreign Artists

The resale royalty would be applied to foreign artists on the basis of reciprocity. This is consistent with the Berne Convention and the general consensus.

6. Alienability

The Berne Convention recognizes an inalienable right to the resale royalty. The Office concludes that if a resale royalty is enacted in the United States it should be inalienable, but transferrable for purposes of assigning collection rights. The Office also suggest that the droit de suite be non-waivable. However, this latter suggestion may be subject to the ultimate resolution of the waivability of moral rights in the United States.

7. Types of Works

The Copyright Office suggests that any droit de suite legislation apply to works of visual art as defined in 17 U.S.C. §101 and in the Visual Artists Rights Act of 1990, with the following exception: For works in limited edition, the Copyright Office would suggest that the statute should fix the number of copies to which the resale royalty would apply at 10 or fewer.

8. Retroactivity

The Office suggests that, if Congress adopts a droit de suite, it should make the law prospective only, i.e., effective only as to the resale of eligible works created on or after the date the law becomes effective.

INTRODUCTION

The idea of a resale royalty for visual artists owes its origin to developments in Europe, primarily in France. This idea, almost universally referred to as the droit de suite, is the right of artists to participate in the proceeds of resales of their works. Since the French enacted the droit de suite in 1920, thirty-six other countries and the State of California have adopted the resale royalty, although only a handful of those countries have fully implemented it.

The U.S. Constitution authorizes Congress to enact federal copyright laws to encourage creativity, but it also requires Congress to balance the artist's incentive to create against the public's interest in widespread dissemination of works. After the United States joined the Berne Convention, Congress began to reexamine the question of whether or not it should provide moral rights for visual artists in the Copyright Act. In so doing it also reexamined the question of whether or not there should be a resale royalty for artists.

On December 1, 1990, President Bush signed into law the Visual Artists Rights Act of 1990 [VARA], which became generally effective on June 1, 1991, and grants to visual artists certain moral rights of attribution and integrity. Section 608(b) of that legislation requires the Register of Copyrights, in consultation with the Chair of the National Endowment of the Arts,

to study the feasibility of implementing a resale royalty on the sale of works of visual art.

The Copyright Office consulted with the National Endowment of the Arts (NEA), and NEA provided the Office with suggested arts organizations that should be contacted in the course of this study. Subsequently, the Copyright Office issued a Notice of Inquiry requesting public comment on enactment of a federal resale royalty for visual artists. Particularly, the Office sought comment from artists, art dealers, auction houses, investment advisors, fine art collectors, and art museum curators. The Copyright Office also published a second Notice of Inquiry announcing that it would continue its investigation of resale royalties for artists by holding two public hearings, one in San Francisco, on January 23, 1992, and another in New York, on March 6, 1992. Both Notices of Inquiries focused principally on seven significant areas where adopting a federal resale royalty would affect U.S. law and the art community: the potential effect on the creation of new works and the existing art market; the form of, beneficiaries of, and term of the right; enforcement and collection mechanisms; whether the right should be waivable and alienable, and whether the California law should be preempted by federal law.

Initial public comments were due on June 1, 1991. The first hearing was held in California and focused primarily on the experience under the California law which went into effect in 1977. The second hearing held in New York expanded the universe to consider what the international experience had been with droit de suite and also to investigate the potential effect of such a law

on the entire American art community, including both artists and those associated with use of their works.

Most commentators, in both the public comment period and the hearings, supported a resale royalty and maintained that visual artists should not be disadvantaged relative to other creators who do receive royalties. A vocal minority, including some artists, opposed the grant of resale royalties.

In addition to reviewing the material contained in the two hearings and the public comments, the Office explored the international experience with droit de suite through consultation with representatives who had direct experience with the system and review of available printed materials discussing what the foreign experience had been. The Office reviewed provisions in both the Berne Convention and the Tunis Model Law that permit but do not require droit de suite, and specifically sought information on the status of the European Community's plan to harmonize droit de suite in member countries--seven of the EC countries already provide such a right. The Office also looked at a number of international or national studies on droit de suite and other legal or economic analyses of the resale royalty right. Finally, the Office contacted witnesses and pertinent organizations, as necessary, to supplement the administrative record. The record, however, does not contain sufficient empirical evidence comparing the respective remuneration of visual artists and other creators to help determine whether visual artists actually are disadvantaged under current copyright law.

The Office's study, Droit de Suite: The Artists Resale Royalty, has two parts. The Report itself sets out what the Copyright Office found in examining and assessing all of the available data on the issue of whether or not the benefits to visual artists from a resale royalty would outweigh any increased costs and possible decreased purchases of works of contemporary art. The Appendix to the Report contains the transcripts of the two public hearings and the comment letters.

I. THE FOREIGN EXPERIENCE WITH DROIT DE SUITE

A. OVERVIEW OF THE HISTORICAL DEVELOPMENT OF DROIT DE SUITE IN EUROPE

Droit de suite is the right of an artist to "follow" or participate in the proceeds realized from the resale of the tangible embodiment of his or her work.¹

Like Puccini's "La Boheme," which opened with an artist and a poet shivering in a Paris garret, the droit de suite grew from a European, particularly French, awareness of the penurious condition of struggling artists at the turn of the last century.

Today, the right of an author of a work of visual art to share a part of the proceeds paid when the work is resold² is based on the premise that visual artists are entitled to participate in an increase in the value of their works in ways that are not otherwise addressed by copyright law.

Traditional copyright law seems to discriminate against visual artists. The rights of reproduction and distribution are better suited to exploitation of literary or musical works. A visual artist's expression is usually embodied in an end product, sold to a single purchaser. The artist's current work and reputation continue to affect the value of that earlier work. Many European countries have adopted the principle that, in the event of resale, the artist should benefit from any increase in value.³

¹ 2 N. Nimmer, Nimmer on Copyright 8-374 (1991).

² Robert Plaisant, The French Law on Proceeds Right: Analysis and Critique in Legal Protection for the Artist IV, IV-1 (N. Nimmer ed. 1971) [hereinafter Plaisant].

³ See Lillian de Pierredon-Fawcett, The Droit de Suite in Literary and Artistic Property 11-12 (1991).

Although the impetus of the droit de suite was largely economic -- to remedy the perceived unfair condition of the artist -- the right depends on this idea of moral entitlement to justify a limitation on the purchaser's absolute ownership of the tangible embodiment of the work. ⁴ An artist is entitled to participate in the increased value of earlier work as a matter of equity, not as a matter of welfare, because the increase results from the artist's continued work; otherwise, the original purchaser is unjustly enriched from the artist's continued evolution. The proceeds right has evolved around an awareness that intellectual creation deserves special protection. ⁵

In 1910 the French legislature introduced the first recognition of the distinction between ownership of an object in which a work is embodied and rights retained by the author even after transfer of the work. ⁶ The Law of April 9, 1910, overturned a 1842 decision of all divisions of the Cour de Cassation that the sale of a painting gave the "purchaser full. . . ownership of the object sold with all its appurtenances." ⁷

One commentator characterizes the development of the proceeds right within the evolution of copyright law: "The evolution of the law of artistic and literary property shows a gradual extension of these limitations at the expense of the owner of the work of art and for the benefit of the artist who created it.

⁴ Id. at 5, 30. See also Max-Planck-Institut für ausländisches und internationales Patent-, Urheber- und Wettbewerbsrecht, The Droit de Suite in German Law in Legal Protection for the Artist VI, VI-35 (H. Nimmer ed. 1971) [hereinafter Max Planck Study].

⁵ Fawcett, supra note 3, at 17. See also id. at 26-27 (noting tendency to refer to a painting as "a Matisse," "a Picasso" or "a Bonnard").

⁶ Id. at 8.

⁷ Id. at 151 (citing 1842 Recueil Dalloz, Périodique et critique [D.P.] I 304; 1842 Recueil Sirey, Jurisprudence [S. Jur.] I 396).

In this evolution, the droit de suite was a new limitation on the right of the owner of artistic works in favor of the artist."⁸

Droit de suite is a French export. The phrase comes from French real property law, where it implies a retention of rights despite changes in ownership.⁹ In French real property law, droit de suite enables the rights holder to seize property in the hands of a third party.¹⁰ An owner of real property may pursue the realty even in the hands of a bona fide taker.¹¹ A French lawyer introduced the concept of droit de suite for visual artists on February 25, 1893, in an article in the *Chronique de Paris*.¹² Since then, its popularity on other shores has risen and fallen with fashion.

In 1920, France became the first country to recognize the droit de suite in law.¹³ Other countries followed France's lead, but with little uniformity. A patchwork of countries have stitched together the varied patterns of droit de suite from a few references in the Berne Convention¹⁴ and the Tunis Law,¹⁵ a model for the smaller, developing countries.

⁸ Fawcett, supra note 3, at 9.

⁹ Id. at 3.

¹⁰ Id.

¹¹ Id.

¹² Id. at 2.

¹³ Plaisant, supra note 2, at IV-1.

¹⁴ Berne Convention for the Protection of Literary and Artistic Works (1886), revised at Brussels (1948) and Paris (1971), Art. 14, reprinted in Fawcett, supra note 3, at 200. Statements of principle in favor of the droit de suite were incorporated into the Berne Convention during the Brussels Conference of 1948.

¹⁵ Model Law of Tunis, Adopted March 2, 1976 at Tunis, reprinted in Fawcett, supra note 3, at 201.

Presently thirty-six countries are identified as having a resale royalty right.¹⁶ In those countries that have adopted the droit de suite, there are significant differences. Some of these distinctions concern how the proceeds right is measured; the types of work whose sale is subject to the droit de suite; and the level of enforcement or commitment the country has given to the concept.

For example:

- **Measuring the proceeds right:** Belgium modeled its 1921 law after France's, measuring the right by the total resale price,¹⁷ while the yardstick of Czechoslovakia's 1926 law gave artists a percent of a "disproportionally large" profit obtained on resale.¹⁸
- **Types of works:** Most countries apply the law only to original works of visual art, but the Uruguayan and Czechoslovakian laws apply to alienation of any literary or artistic work.¹⁹

¹⁶ The countries include: Algeria, Belgium, Benin, Brazil, Burkina Faso, Cameroon, Central Africa, Chile, Congo, Costa Rica, Czechoslovakia, Ecuador, France, Germany, Guinea, Hungary, Holy See, Italy, Iraq, Ivory Coast, Laos, Luxembourg, Madagascar, Mali, Monaco, Morocco, Peru, Philippines, Portugal, Rwanda, Senegal, Spain, Tunisia, Turkey, Uruguay, and the former Yugoslavia. Poland rescinded its artists' royalty legislation in 1952. The State of California in the United States also has resale royalty legislation.

¹⁷ Belgian Law of June 25, 1921, Imposing, in the Case of Works of Art, Sold at Public Auctions, a Levy in Favor of the Artists of the Works Sold, reprinted in Fawcett, supra note 3, at 204 [hereinafter Belgian Law].

¹⁸ See infra notes 185-95 and accompanying text (discussing Czechoslovakian law).

¹⁹ See infra notes 184-92 and accompanying text (discussing laws of Uruguay and Czechoslovakia).

- **Level of Commitment:** Poland enacted a resale royalty law in 1935,²⁰ but rescinded it in 1952.²¹ Italy passed a complex droit de suite statute in 1941,²² but the royalty right in that country is virtually ignored in practice.²³ Of the 36 countries identified as having resale royalty legislation at least 17 lack implementing legislation or procedures for collecting the royalty.²⁴ Practically speaking, in these countries, the droit de suite is recognized in name only.

The Copyright Office examined the provisions in all of the foreign countries that claim they have droit de suite, but this chapter will focus on selected representative countries and the development of multinational expressions of the right.

²⁰ Polish Law of May 22, 1935, art. 29, reprinted in Fawcett, supra note 3, at 248.

²¹ Resale Royalty— A New Right For Artists 69 Australian Copyright Council 4 (1989).

²² Italian Law of Apr. 22, 1941, art. 144-55, reprinted in Fawcett, supra note 3, at 235-37.

²³ As early as 1950 the application of the Italian droit de suite legislation "came to a standstill." See Vittorio M. DeSanctis and Mario Fabiani, The Right on the Increase in Value of the Works of Fine Arts in the Italian Copyright Law, in Legal Protection for the Artist at V, V-39 (M. Nimmer ed. 1971) [hereinafter DeSanctis].

²⁴ Australian Copyright Council, supra note 21, at 4. See also Fawcett, supra note 3, at 133 (droit de suite "has remained virtually a dead letter in twenty-four" of the jurisdictions that have adopted it).

B. FRANCE

1. Development of the Law

France was the birthplace of the droit de suite, and has been called "the best testimony of its validity and equity."²⁵ The drafted idea emerged in France towards the end of the nineteenth century. Legislators drafted the first specific proposals for a French law in 1903.²⁶ The development of the French law and the treatment of its constituent elements -- length of term, types of works, measurement of the royalty, inalienability -- have had an impact on the law in other countries that have followed France's lead.

The first proposals were premised on the creation of an official registry, which would maintain a directory of works of art. Under this proposal, which did not succeed, artists would have received part of the resale price in exchange for certifying their work's authenticity.²⁷

The Societe des Amis du Luxembourg, founded in 1903 in part to promote recognition of droit de suite, sought an artists' royalty of one or two percent of the price obtained at public auction.²⁸

Champions of droit de suite initiated a public relations campaign in 1905. The French press widely published a drawing by Forain depicting two ragged children watching their father's painting sell at auction for 100,000 francs.

²⁵ New York Hearing on Artists Resale Royalties (Mar. 6, 1992) [hereinafter New York Hearing] (statement of Jean-Marc Gutton, General Manager of the Societe des Auteurs dans les Arts Graphiques et Plastiques), App. Part III at 6.

²⁶ Fawcett, supra note 3, at 3.

²⁷ Id. An 1881 amendment to the Chambre des Deputes to create an office charged with setting up and maintaining a directory of works of art was rejected. Id. at 149 n. 11.

²⁸ Id. at 3 and 150 n. 13.

This campaign is credited with alerting the French public to the economic plight of artists.²⁹ Next, in 1909, artists formed two artists' rights societies to push for a resale royalty, and in 1914 and 1918 bills intended to give artists two percent of the auction sales price of their works were submitted to the legislature.³⁰

a. The 1920 Law. In 1920, France formally recognized the droit de suite. The Law of May 20, 1920, granted artists an inalienable right to a percentage of the sales price of their works sold at public auction.³¹ The law applied to public sale of works such as paintings and sculpture, if the works were original and represented a personal creation of the artist.³² The right belonged to the artists' heirs and successors in title "for a period equivalent to the duration of artistic property" (i.e., for the duration of the copyright).³³

Rules for administering the law were issued in a 1920 decree that provided for a registry for works of art.³⁴ Under the decree, the artist (or heirs or successors) had to make a declaration in the Journal Officiel (the French equivalent of the Federal Register), or request within 24 hours after the sale that public officials effect the levy. The artist was to mail

²⁹ Id. at 3 and 150 n. 14; Australian Copyright Council, supra note 21, at 3.

³⁰ Fawcett, supra note 3, at 3-4.

³¹ Law of May 20, 1920, reprinted in Fawcett, supra note 3, at 218.

³² Id.

³³ Id.

³⁴ Decree of December 17, 1920, Relating to the Application of the Law of May 20, 1920, reprinted in Fawcett, supra note 3, at 218.

simultaneously a copy of the statement to the arts ministry.³⁵ It was expected that this would build up a public register for works of art. The registry did not succeed, however, and royalties are now collected by the artists' societies.³⁶

2. Measuring the Proceeds Right

Originally the droit de suite was based on a one percent levy for a resale price of 1,000 to 10,000 francs; 1.5 percent from 10,000 to 20,000 francs; two percent from 20,000 to 50,000 francs; and three percent for resales of more than 50,000 francs.³⁷ The rate of the levy is now uniformly fixed at a flat rate of three percent of the resale price on a sales price of more than 100 francs.³⁸

The droit de suite is collected on the total sales price of each work, whether there is an appreciation in value or not. This aspect of the French law has been followed by Germany and Belgium, but is criticized because it departs from the rationale of allowing artists to participate in an increase in the value of their works. Critics also attack this approach because a

³⁵ Id.

³⁶ See infra notes 87-101 and accompanying text (discussing artists' societies). The decree of Dec. 17, 1920, provided for representation by artists' societies in art. 3.

³⁷ Law of May 20, 1920, art. 2, reprinted in Fawcett, supra note 3, at 218.

³⁸ Comment of Société des Auteurs des Arts Visuels submitted by Martin Dauvergne, Director Girant, and Pascal Aubion at 46 illustrated by Jean Christophe Ienne [hereinafter Comment 10 (SPADEN)], App. Part I.

collector has to pay a piece of the resale price even if he or she has suffered a net loss, i.e., if the work has decreased in value. ³⁹

In France, Germany, and most other countries with a droit de suite, this method of measuring the proceeds right has become accepted as a matter of expediency. Measuring the resale royalty by the sales price is considered simplest and most practical since it is "not necessary to keep a record of the previous sales prices, the percentage being based only on the present sales prices." ⁴⁰ Germany adopted this method for its droit de suite, both for facility and to protect the privacy interests of art collectors and sellers. ⁴¹

3. Foreign Authors

The 1920 decree provided that artists of foreign nationality were to benefit from the droit de suite in the same manner and under the same conditions as French artists if their national laws extended the same right to French artists. ⁴²

The 1956 decree, however, more explicitly singled out artists who "have participated in French artistic life and maintained a residence in France for five years, not necessarily consecutively." These artists may "on condition

³⁹ See, e.g., New York Hearing at 232-33 (statement of Gilbert Edelson, Art Dealers Association of America) ("That the collector, in essence, would go out, take a chance on the artist, support the artist, pay the money, lose money, and then pay something in addition. I don't quite understand why that is fair.")

⁴⁰ Fawcett, supra note 3, at 5.

⁴¹ See infra notes 155-58 and accompanying text (discussing German method of measuring proceeds right).

⁴² Decree of December 17, 1920, supra note 34.

of reciprocity," benefit from the droit de suite.⁴³ A January 1957 order created a commission to rule upon applications by foreign artists.⁴⁴

4. Term

In 1957, France undertook a major revision of its artists' rights law. It repealed the 1920 law and rules and made droit de suite part of the French law relating to copyright and exploitation of economic rights of authors.⁴⁵ Accordingly, the proceeds right now subsists for the author's life plus fifty years.⁴⁶ This revision has raised the question of whether or not the resale royalty should be regarded as part of copyright law. Some in France have argued that it should not, since the right pertains to resale of the tangible work, not the rights protecting the creation embodied in the material.⁴⁷ Others argue that the royalty does pertain to the creation embodied in the material, and is a recognition of visual art's unique ties to the tangible embodiment of the expression. They assert that the French copyright laws and others are premised on an author being entitled to share in money realized from a work of art; the proceeds right is "a natural part of copyright, and. . . a particular application

⁴³ Decree of September 15, 1956, reprinted in Fawcett, supra note 3, at 224.

⁴⁴ Order of January 21, 1957, Concerning the Exercise of Droit de Suite by Artists of Foreign Nationality, reprinted in Fawcett, supra note 3, at 224.

⁴⁵ Plaisant, supra note 2, at IV-1; Fawcett, supra note 3, at 45.

⁴⁶ Plaisant, supra note 2, at IV-1; The 50 year term may soon be expanded to 70 years. Comment 10 at 46 (SPADEN) (Appended Documents), App. Part I.

⁴⁷ "According to French law, artistic and literary property applies to the reproduction or representation of the literary or artistic work and is not concerned with the tangible work itself"
Plaisant, supra note 2, at IV-5.

of the copyright principle to works which cannot substantially exploit reproduction or performance rights." ⁴⁸

These commentators maintain that the distinction between copyright and the right in the tangible work itself is not absolute. There are precedents in France for limits on property rights in the tangible object. For example, the author of a visual artwork in France can require the owner to give him possession for a short time in order to exercise the right of reproduction. Also, the purchaser of a phonorecord cannot use that record for public performance. ⁴⁹

5. Works Covered

Under the 1920 law, the droit de suite applied to pictures, sculptures, and drawings which are original or embody a personal creation of the author. ⁵⁰ Under the 1957 law, the droit de suite applies to "graphic and plastic works."

The authors' societies have concluded agreements with the auctioneers for the purpose of defining works to be covered by the droit de suite. ⁵¹ Whenever a work is to be made in more than one copy, such as sculptures, engravings, tapestries, or photos, the artists' representatives and the auctioneers' societies have very specific agreements as to the number of copies to which the royalty will apply. ⁵² For example, for sculpture the droit de suite will apply to eight copies, which must be numbered (1/8, 2/8,...8/8) and

⁴⁸ Id. at VI-26 and 27.

⁴⁹ Id. at IV-5 and 7.

⁵⁰ Law of May 20, 1920, art. 1, reprinted in Fawcett, supra note 3, at 218.

⁵¹ Plaisant, supra note 2, at IV-25 and 26.

⁵² Comment 10 at 45 (SPADEN), App. Part I.

signed by the author. These copies must be executed by the artist or controlled by him (e.g., the casting of a sculpture). Up to eight original copies may be cast after the author's death.⁵³ Droit de suite will apply to up to 100 copies of an engraving, as long as those copies are numbered and signed by the artist.⁵⁴ It will cover up to six copies of the same work of a tapestry, as long as those copies are supervised by the artist, numbered and signed by him.⁵⁵

Whether or not the term "graphic work" encompasses literary or musical manuscripts is a subject of debate. Auctioneers and most law professors exclude manuscripts from the scope of droit de suite, but the matter has not been settled by the courts.⁵⁶ Royalties are paid, however, on the binding of a book when it is original.⁵⁷

With regard to furniture and design works, a recent decision of the Cour d'appel de Paris has limited the scope of the droit de suite, by narrowly construing the term "graphic and plastic work" in Article 42 of the 1957 author's right law. The court denied the status of original work to pieces of furniture created by Jean Dunand, a well-known "art deco" furniture artist, because he had

⁵³ Id. (citing The Rodin case, Judgment of March 18, 1986, Cour de Cassation, 1st Civ. 129 Revue Internationale du Droit d'Auteur 138 (July 1986)).

⁵⁴ Id. (citing Agreement of November 28, 1957, between Authors and Auctioneers).

⁵⁵ Id. (citing Agreement of January 15, 1958, between Authors and Auctioneers).

⁵⁶ Id. See also note 217 and accompanying text (discussing treatment of manuscripts under Tunis Model law and in WIPO-UNESCO Draft Guidelines).

⁵⁷ Plaisant, supra note 2, at IV-15.

"created" them only intellectually, not with his own hands.⁵⁸ Similarly, the French courts refused to apply the droit de suite to "design" works.⁵⁹

6. Inalienability

An eligible artist cannot waive droit de suite in France.⁶⁰ The inalienability of the proceeds right has been referred to as an exception to its economic character, and a testament to its qualities as a personal or moral right.⁶¹ The right cannot be transferred during the artist's lifetime, and generally cannot be seized by creditors; creditors can seize only a sum paid after a specific sale.⁶²

After the artist's death, the droit de suite may benefit only the artist's heirs, with legatees and assigns being generally excluded.⁶³ Article 42 of the 1957 law provides that "after the author's death, this droit de suite shall subsist to the benefit of the heirs and, for the usufruct provided by Article 24, to the benefit of the spouse, but excluding all legatees and transferees."⁶⁴ The right cannot be alienated by a will in France. If the author leaves nothing to his heirs, Professor Plaisant suggests that either 1) the heirs keep the proceeds right in spite of the author's will; or 2) the right

⁵⁸ Judgment of Jan. 28, 1991, 4 *en chambre*, R.I.D.A. No. 130 October 1991. See also New York Hearing at 38 (statement of Jean-Marc Gutton) (droit de suite applies to "furniture, but only if it is an original work and not a series").

⁵⁹ Comment 10 at 51 (SPADEN), App. Part I.

⁶⁰ Plaisant, *supra* note 2, at IV-8.

⁶¹ Fawcett, *supra* note 3, at 38.

⁶² Plaisant, *supra* note 2, at IV-9.

⁶³ Fawcett, *supra* note 3, at 43.

⁶⁴ (Emphasis added.)

disappears. He also asserts that it is "neither reasonable, nor in accordance with the purpose of the proceeds right," to give a reserve right to distant relatives, including brothers, sisters, or cousins. ⁶⁵

French courts have held that the proceeds right passes to the heirs of the heir and not to another relative of the author. ⁶⁶ Although the law does not direct how the royalty should be divided among several heirs, at least one commentator suggests that the money be divided "according to the general rules of the Civil Code. . . ." ⁶⁷

At least three cases involving celebrated artists have examined whether, after the artist's death, the droit de suite would follow the normal rules of succession.

a. The Monet case. The impressionist painter Claude Monet died in 1926; his only heir was his son Michel Monet. The son died in 1966; he had named the Mormottan Museum as his general legatee. One of Monet's paintings sold at auction that year, but the museum was not eligible for the droit de suite due to the Article 42 prohibition. ⁶⁸ The painter's niece claimed the droit de suite; the auctioneer denied her claim, and the dispute went to litigation.

Interpreting the term "heir" in Article 42, the Cour d'appel de Paris decided on January 7, 1970, that the droit de suite is extinguished on the death of the artist's heir if there are no other heirs who share in the estate of the deceased artist. The Cour de cassation vacated that judgment, however, ruling

⁶⁵ Plaisant, supra note 2, at IV-9.

⁶⁶ Id. at IV-11 (citing Trib. Civ. Seine 5 Feb. 5th 1937. D.P. 1937 II. 41 note Escarra, Gazette Palais 437, I. 351. Conclusions du procureur Jodelet).

⁶⁷ Id. at IV-23.

⁶⁸ See supra text accompanying note 64 (discussing art. 42 reference to "legatees and transferees.").

that the droit de suite may be transferred to the author's heirs and thereafter to their heirs.⁶⁹

On remand the Cour d'appel of Orleans affirmed the Cour de cassation ruling, deciding that the proceeds right may be exercised "not only by the immediate heirs of the work's author but also, more generally, by his heirs-at-law in the regular order of succession, whether they are themselves named to succeed to his estate or qualify indirectly."⁷⁰ Thereafter, the droit de suite was governed in France by the ordinary rules of succession.⁷¹

b. The Utrillo case. In a second case, the painter Utrillo, who died in 1955, had designated his wife as general legatee. She died in 1965, leaving as her heir her daughter from a previous marriage. On May 26, 1975, the Cour d'Appel de Paris denied the daughter the benefit of the droit de suite because the daughter was not "in any degree related" to the artist. The decision of the appeals court was affirmed by the Cour de cassation, meaning that the droit de suite would be granted only to those who have a blood relationship with the artist.⁷²

c. The Braque case. A third case involved the artist Braque, who died in 1963. He was survived by his wife, who died a few months later, and his nephew. The nephew died in 1972, and he was survived by his wife.

After a 1982 auction sale of Braque's paintings, three distant cousins of Braque claimed royalties in the sale. Applying the holding in the

⁶⁹ See Fawcett, supra note 3, at 44, 300 (discussing and citing in full Monet case).

⁷⁰ Id.

⁷¹ Id.

⁷² See Fawcett, supra note 3, at 44, 300 (discussing and citing in full Utrillo decision).

Utrillo case, the Cour d'appel de Paris held that the nephew's widow could not claim the droit de suite because she had no blood ties with Braque.⁷³ Further, it held that the three cousins could not claim the droit de suite, because they were not the nephew's heirs. Their claim was superseded by the nephew's wife, even though she could not claim the right. The case then went to the Cour de cassation, which made clear that article 42 meant there could be no distinction between the author's heirs and the subsequent heirs (i.e., the heir's heirs).⁷⁴ The effect of this holding upon the requirement of blood ties is not clear, but while the droit de suite cannot be alienated by way of sale, it appears that the proceeds right is otherwise descendible in order of the legal devolution provided for by the French civil code.

Commentators who argue that the droit de suite should be treated as an author's right, subject to the ordinary legal rules applicable to other economic rights of authors, have criticized the approach taken by the French court in the Utrillo case.⁷⁵ Ms. Fawcett argues that, like the performance and reproduction rights, the droit de suite allows the author to share in the exploitation of the work and to derive a financial benefit from it, and thus should take its place among author's economic rights, and not be limited to blood relatives. She also asserts that the element of inalienability should be renounced:

The legislature, wishing to protect the artist and his family against themselves, allowed itself to be led

⁷³ Judgment of October 15, 1986, R.I.D.A. No. 136, April 1988, p. 1hh.

⁷⁴ Id.

⁷⁵ Fawcett, supra note 3, at 45. But see Plaisant, supra note 2, at IV-8 ("We think that such a limitation is good...the equitable grounds upon which the right is based do not warrant giving this privilege to people who do not have a close connection with the author").

into a path which departs from the usual legal rules and has created, as between the legal arrangements made for artists and those made for other authors, a distortion that does not seem to be justified by any convincing argument...The ambiguity can only be resolved by renouncing the element of inalienability. ⁷⁶

7. Auction Sales and Dealer Sales

a. Auction sales. Originally, the French law applied only to sales at auction. Auctions are the minimum field of application for the droit de suite in all countries which have adopted this principle. In fact auction sales were a major stimulant for the droit de suite, since the high prices reached by some works at auction made the public aware of the problem. Public auctions are also easier to monitor than dealer sales because of the careful record keeping involved and the advertising of works put up for sale. ⁷⁷

Auction sales were the subject of an early case interpreting the French droit de suite. Sellers at auction sales commonly set a reserve price below which there can be no sale. If bids stop below that price, the seller sometimes withdraws the offer for sale, or the auctioneer makes the next highest bid, and the item is returned to the seller. An issue arose as to whether the droit de suite should be collected for artists when the work has been put up for bids but "withdrawn," that is where the purchaser is also the seller. ⁷⁸

In a January 21, 1931 decision, the Tribunal de la Seine decided that there had been an auction sale in such a case. ⁷⁹ Where the minimum price set by the seller had not been disclosed before the sale in such a way that it was

⁷⁶ Fawcett, supra note 3, at 47.

⁷⁷ Id. at 78-81.

⁷⁸ See id. at 79.

⁷⁹ Id. at 299 (citing Judgment of January 21, 1931, Tribunal de la Seine, 1931 G.P. 1301. 1936 Rev. Trim. Dr. Civ., comment of Wahl.).

impliedly accepted by the bidders, the right of withdrawal could not be invoked against a third party. The court apparently saw a danger of an art owner stepping up bids to create an artificial price which would enable him later to obtain a higher price in a private transaction, thereby avoiding payment of the droit de suite.⁸⁰

b. Dealer sales. Under the 1957 law, the French droit de suite was extended to include sales "through a dealer," as well as public auctions.⁸¹ Implementing rules were never issued, however, and the existing rules do not apply to private sales.⁸² Consequently, the French law still applies in practice only to auction sales. It is estimated that the value of the art market including gallery and dealer sales is four times as large as the auction market.⁸³

Why has the French law never been applied in practice to dealer sales? Like measuring the royalty by the resale price (rather than the increase in value), the application of the droit de suite to auction sales (rather than all sales including dealer and private sales) is a departure from the law's

⁸⁰ Id. at 80. Critics of this decision complain that where the seller exercises the option of withdrawal, ownership is not actually transferred. See Fawcett, supra note 3, at 81 (citing A. Wahl, Le Droit des Artistes sur les oeuvres retirees d'une vente publique ou adjugees au profit du vendeur, 35 Revue Trimestrielle de Droit Civil [Rev. trim. civ.] 613, 623.). Fawcett advocates limiting the exercise of withdrawal to the fixing of a reserve price. "This seems to us to protect the seller's interests sufficiently while assuring that the option to withdraw cannot be diverted from its purpose and used for speculative ends since the price would be set before the sale in agreement with the auctioneer." Id.

⁸¹ Copyright Statute: Law Number 57-298 of March 11, 1957, as amended by Law Number 85-660 of July 3, 1985, reprinted in Fawcett, supra note 3, at 225.

⁸² Plaisant, supra note 2, at IV-1.

⁸³ Letter from Gérard Champin, President, Chambre Nationale des Commissaires Priseurs (Sept. 30, 1992).

rationale justified by expediency. Including dealer sales, which are difficult to monitor, increases the administrative challenge and the risk of noncompliance.⁸⁴

It has also been asserted that the French executive opposes extension to dealer sales, and therefore refuses to issue regulations, while the parliament favors authors and will not abrogate the extension.⁸⁵

Perhaps the most reasonable explanation is given by Jean-Marc Gutton, Director General of the French artists' collecting society ADAGP. He observes that, after the 1957 bill was signed into law -- but before any implementing decrees occurred-- the artists' societies reached agreements with the auctioneers and the art galleries, by which the galleries would pay an employer's "social security subscription" to the artist's branch of the social security, even though artists are not employees of galleries. The "subscription" paid by galleries does not depend upon the sale of works qualifying for the resale right; instead, it is a percentage of the galleries' gross incomes.⁸⁶ This agreement

⁸⁴ See New York Hearing at 120 (statement of Robert Panzer of Visual Artists and Galleries Association) (asserting that royalty should apply only to sales by auction houses, because including dealers "would be extremely difficult both definitionally and from the standpoint of enforcement"). Accord, John H. Merryman and Albert Elsen, Law, Ethics and the Visual Arts 214 (1987). But see Plaisant, supra note 2, at IV-28 (writing "There is no reason not to do so. If it is done, since policing is difficult, fraud will be frequent. However, authors' societies are able to adequately police the use of musical works. Authors' societies which collect the proceeds right could reach an agreement with merchant associations, or, at least, with the most important merchants."); New York Hearing at 42-43 (statement of William Patry, United States Copyright Office) (noting that German law applies to galleries and asking whether U.S. should look to German model as "better source" than French model).

⁸⁵ Merryman, supra note 84, at 214; Plaisant, supra note 2, at IV-21.

⁸⁶ Telephone interview with Jean-Marc Gutton, Director General of ADAGP (July 30, 1992).

apparently diffused some of the momentum to collect the droit de suite from dealers.

The French law provides social security for artists. Gutton cautions, however, against confusing author's rights and social security. He argues that the ground for droit de suite is not as a welfare measure, but as a means for enabling artists to obtain their rightful share in the proceeds of resale.⁸⁷

8. Collection of the Droit de Suite: the Artists' Societies

Two private authors' societies, Societe de la Propriete Artistique et des Dessins et Models (SPADEN) and the Association pour la Diffusion des Arts Graphiques et Plastiques (ADAGP), dominate the collection process in France. These authors' societies are similar to ASCAP or BMI for composers in the United States.⁸⁸

Artists in France join SPADEN or ADAGP and assign the power to collect their proceeds right to the society. The auctioneers must pay the royalty either to an author's society, which will give it back to the artist less management costs (usually 15 percent); or directly to the author or his or her

⁸⁷ Id. This same argument is made to counter assertions that the droit de suite will help mainly the most successful artists rather than the struggling unknowns: if the proceeds share is their rightful entitlement, the argument goes, then the wealth or poverty of the artist is irrelevant. See, e.g., New York Hearing at 13 (statement of Jean-Marc Gutton) ("Droit de suite should not be considered as a capital gains tax, but as an artist's right which it is normal for them to receive.").

⁸⁸ There are also artist rights societies in the United States that collect royalties for reproduction and other rights. See *infra* Ch. III, notes 109-10 and accompanying text (discussing VAGA and Artists' Rights Society).

heirs, who must demand the royalty payment not later than three days after the sale has occurred.⁸⁰

Under the decree of December 17, 1920, authors can claim the droit de suite in two ways: by specific declaration or general declaration.⁸⁰ Under a specific declaration, which is rarely used, the author has 24 hours after the sale to demand the royalty from the auctioneer or other public official. Under a general declaration, the author declares and publishes in the Journal Officiel a notice that he or she will invoke the proceeds right for his or her works, and also delivers a copy to the ministry of fine arts.⁸¹ Alternatively, the author joins an authors' society which will represent the artist and make a collective declaration for its members.

Whether a general or specific declaration is made, the auctioneer must give notice to the beneficiary within three days of the sale, and the beneficiary must prove his identity and right to the royalty. If the money is not paid within three days, the auctioneer must notify the beneficiaries again the following month. If after three months the beneficiary has not claimed the payment, the auctioneer pays the money to the seller. Where there are conflicting claims to the money, the auctioneer deposits the money at the Caisse des depot et Consignation.⁸²

⁸⁰ Comment 10, at 46 (SPADEN), App. Part I. Originally, the French law had required artists to register claims to resale royalties in the Journal Officiel, and send a copy of the registration statement to the ministry of fine arts. The goal was to build up a fine art registry for purposes of authentication, but the system did not work. See supra notes 34-36 and accompanying text (discussing registry).

⁸⁰ Plaisant, supra note 2, at IV-22.

⁸¹ Id. See also notes 34-36 and accompanying text (discussing procedures under 1920 decree).

⁸² Plaisant, supra note 2, at IV-23 and 24.

The most common method of general declaration involves the authors' societies. ⁸³ Although there is no legal obligation to join an author's society, very few authors act as individuals. Authors' societies file collective declarations with an alphabetical list of authors, for whose works the royalty is to be paid. The national union of auctioneers and SPADEN concluded agreements and issued a general declaration relating to droit de suite in July of 1956. ⁸⁴

Both of the French artists' rights societies are associations; they charge a 15 percent fee for their work, intended to cover administrative expenses, not to earn a profit. Both societies were organized to help authors exercise their rights, to protect author's interests, and generally to promote culture. ⁸⁵

Mr. Gutton asserted a common view that authors' societies are the best vehicle for collection of droit de suite proceeds because they are best equipped to follow the art market and cope with the auctioneer's lobby. ⁸⁶ The societies monitor auction house catalogues published before sales of importance, acquire information from auction houses about upcoming sales, and have access to the auctioneers' registers. Auctioneers must keep a register recording each sale. These registers are open to authors and their heirs or representatives, including the authors' societies. ⁸⁷

⁸³ Id. at IV-24 (citing Arrêté of February 21, 1921). The societies act as representatives of the artists. The law provides for this representation. Id. at IV-25 (citing Decree of Dec. 17, 1920, art. 3).

⁸⁴ Id. at IV-21 - IV-24.

⁸⁵ Id. at IV-24 and 25.

⁸⁶ Comment 16 (ADAGP), App. Part I.

⁸⁷ Plaisant, supra note 2, at IV-24 and 25.

After each sale, the society sends the auctioneer a schedule with the author's name, catalogue number, title of the work, and selling price.

According to ADAGP, 70 percent of all money distributed by that organization came from droit de suite, as compared to 30 percent from account representation and reproduction rights.⁹⁸ ADAGP also reported that as the art market in France expands, so do droit de suite proceeds, from a reported 13 million francs (2.35 million U.S. dollars) in 1988, to 52 million francs (9.4 million U.S. dollars) in 1990.⁹⁹

Mr. Gutton has reported the figures in a slightly different manner in accounting for an art market downturn in 1991. According to Gutton, in 1990, ADAGP collected resale royalties for 1,650 of its 2,500 members (85 percent of whom are living artists) of more than \$10.5 million, distributed in the following proportions: 1100 members received between \$20 and \$2,000; 400 members received between \$2,000 and \$20,000; 100 members received between \$20,000 and \$40,000; and 50 members received more than \$40,000. In 1991, after the market decrease, ADAGP distributed \$7 million to its members. He also testified that SPADEM, ADAGP's counterpart, collected \$7 million in 1990 and \$4 million in 1991.¹⁰⁰

Each payment of droit de suite to an artist is accompanied by a detailed statement of all transactions concerned, allowing an artist "to remain perfectly well-informed about the destiny of his artworks on the art market."¹⁰¹

⁹⁸ Comment 16 (ADAGP), App. Part I.

⁹⁹ Id.

¹⁰⁰ New York Hearing at 15-16 (statement of Jean-Marc Gutton), App. Part III.

¹⁰¹ Id. at 14.

The French collection societies claim to be reducing their administrative costs. Mr. Gutton, the Managing Director of ADAGP, terms the administrative burden "light," and reports that for every \$20 collected more than \$16 are distributed.¹⁰² SPADEM maintains that French artists are unanimously in favor of droit de suite, and that it does not serve as an impediment to either their artistic careers or the art market.¹⁰³

9. The Effect of the Resale Royalty on the French Art Market

Mr. Gutton insists that, "[F]ar from ruining the art market in the countries where droit de suite is applied, it brings those countries a level of stability for which they are envied by countries where the right is not applied."¹⁰⁴ He asserts that "from 1980 to 1990, the progression of modern art sales in France vied successfully with progression in the United States," a country without the droit de suite.¹⁰⁵ This suffices, he says, "to prove that droit de suite does not depress the market."¹⁰⁶

¹⁰² Id.

¹⁰³ Comment 10, at 47 (SPADEM), App. Part I.

¹⁰⁴ New York Hearing at 11 (statement of Jean-Marc Gutton), App. Part III.

¹⁰⁵ Id. at 11-12. In France, between 1980 and 1987, sales of purely contemporary art multiplied by 10. In the United States, during the same period, sales of art multiplied by 17, but these included sales of Impressionist Art. In fact, says Gutton, the Parisian art market suffered less from the market collapse of 1991 than did the United States or London markets, because it was less involved with speculation in works of extremely high value (such as Impressionist works): the annual figures of 1991 as compared with 1990 show a drop of nearly 55 percent for Sotheby's, 49 percent for Christies, and only 37 percent for Drouot. Id. at 12.

¹⁰⁶ Id. at 12-13. Furthermore, he claims, "all serious surveys have shown that there is no greater tendency towards underground business activities in countries where droit de suite is applied than elsewhere." Id. But see New York Hearing at 220-24 (statement of Stephen Weil, Hirshhorn Museum, Washington, D.C.) (predicting depressive effect on market and removal of art transactions to other
(continued...))

In contrast, Gerard Champin, President of the Chambre Nationale des Commissaires-Priseurs, ¹⁰⁷ writes that the French market is "disadvantaged compared to the other European center for modern art sales, which is London. Indeed we must remember that the transportation cost is very small compared to the cost of 'droit de suite'. The vendors won't hesitate to move their goods several hundred miles to save three percent." ¹⁰⁸ The Chambre Nationale des Commissaires-Priseurs plays a role in the administration of the droit de suite, overseeing the validity of the requests and, after verification, authorizing or not the payment by the Commissaires-Priseurs. Champin claims that the introduction of the droit de suite into United States law "should not have a negative repercussion on the art market provided its rate is reasonable, one percent for example." ¹⁰⁹

C. BELGIUM

1. Development of the Law

Belgium quickly became the first country to follow France's lead in recognizing the droit de suite. On June, 25, 1921, it passed a resale royalty law modeled after France's. ¹¹⁰

¹⁰⁶(...continued)
jurisdictions); see also Bolch, Damon, & Hinshaw, An Economic Analysis of the California Art Royalty Statute, 10 Conn. L. Rev. 689 (1978) (presenting through economic analysis thesis that royalty will depress prices collectors will pay in primary market and will disadvantage whole in order to benefit few).

¹⁰⁷ This group is comprised of public officers, auctioneers.

¹⁰⁸ Letter from Gérard Champin, President, Chambre Nationale des Commissaires-Priseurs, to Ralph Oman, Register of Copyrights (Sept. 30, 1992).

¹⁰⁹ Id.

¹¹⁰ Belgian Law, supra note 17.

Commentators have noted that the early resale royalty laws were passed because of a humanistic or romantic view of the artist. Fawcett observes that:

[T]his legal recognition, both in France and Belgium, came about because of the social and cultural setting in which the reform was taking place rather than because it represented the culmination of a judicial evolution. After the initial euphoria, the droit de suite was to become an object of disputes among commentators, disputes which were later exploited by auctioneers and art dealers in order to resist practical implementation of the right."¹¹¹

2. Measuring the Proceeds Right

As in France, the droit de suite in Belgium is based on the total resale price.¹¹² Article 2 of the Belgian law provides that the levy "shall be withheld from the selling price of each work."¹¹³ Unlike France, however, the tariff of the droit de suite in Belgium varies according to the sales price of the work: two percent of sums from 1,000 to 10,000 francs; three percent of sums from 10,000 to 20,000 francs; four percent of sums from 20,000 to 50,000 francs; and six percent of sums in excess of 50,000 francs.¹¹⁴

As in France, the Belgian method of measuring the royalty-- based on the total sales price, whether there is an increase in value or not-- represents a departure from the law's rationale, which is to allow artists to benefit from an appreciation in the value of their work.

¹¹¹ Fawcett, supra note 3, at 4.

¹¹² Sherman, Incorporation of the Droit de Suite into United States Copyright Law, 18 Copyright L. Symp. (ASCAP) 50, 54 (1968). See Table 1 for a comparison of basis of determination in selected countries.

¹¹³ Belgian Law, supra note 17 at art. 2.

¹¹⁴ Id.

The droit de suite in Belgium is said to be founded on the civil law concept of "enrichment sans cause," or unjust enrichment. As the artist's growing fame and reputation increases the value of the earlier work, the purchaser benefits; if the purchaser benefits to the exclusion of the artist, this is seen as unjust enrichment.¹¹⁵

Related to the idea of "enrichissement sans cause" is the concept of "imprevision," or hardship due to changed circumstances. Where continuation of a contract would result in a hardship to one of the parties, the civil law would permit a revision of its terms.¹¹⁶

These ideas are woven into the rationale for the Belgian droit de suite. Mauvermans, rapporteur of the Belgian law, wrote:

Agreements may be voided on the grounds of "imprevision" (hardship due to unforeseeable circumstances) and when we turn to the heartbreaking stories of great artists dying in destitution, they must surely move us to extend the scope of the principle. From another angle, it is surely proper to constitute a permanent association between the artist and the person who acquires his work, and to reserve to the creator a share in the profits resulting from later appreciation.¹¹⁷

3. Foreign Authors

Under the Belgian Law of 1921, the benefit of the droit de suite applies to nationals of countries granting equivalent rights to Belgian nationals.¹¹⁸ By a 1923 regulation, French artists whose works were sold at

¹¹⁵ Sherman, supra note 112, at 59.

¹¹⁶ Id.

¹¹⁷ Pierre Recht, Has the "Droit de Suite" a Place in Copyright?, 3 Unesco Copyright Bulletin 51, 55 (1950) (quoting Mauvermans).

¹¹⁸ Belgian Law, supra note 17, at art. 4.

auction in Belgium were granted the droit de suite in Belgium, thereby reciprocating the extension of such rights in France to Belgian artists.¹¹⁹

4. Term

Although Belgium is unique in that its droit de suite is recognized in a separate law, while other countries have incorporated the requirement into their authors' rights laws, the duration of the right in Belgium is the same as for the copyright law or other economic rights of authors.¹²⁰

5. Works

The droit de suite in Belgium is granted to artists in respect of their works which are sold at public auctions, provided the works, "such as paintings, sculpture, drawings and engravings, are original and represent personal creations of their authors."¹²¹

6. Inalienability

Beneficiaries after death include heirs and successors.¹²² Succession to the droit de suite is covered by the ordinary legal rules on succession.¹²³ On April 25, 1945, deciding whether the principle of inalienability of the droit de suite also applied to transmission by reason of death, the Judge de paix of the 2nd Canton of Brussels decided that the droit de

¹¹⁹ Regulation of September 5, 1923, reprinted in Fawcett, supra note 3, at 207.

¹²⁰ The Belgian Law, art. 1, par. 2, provides that the right shall exist "for a period equal to the duration of copyright according to the laws in force."

¹²¹ Id. at art. 1, par. 1.

¹²² Art. 1, par. 2 of the Belgian law provides that "[t]he same right shall belong to the heirs and successors in title of artists as designated by the Law of March 22, 1886..."

¹²³ Fawcett, supra note 3, at 42.

suite could be the object of a legacy, and that legatees could be beneficiaries of the droit de suite.¹²⁴ On June 26, 1967, the Tribunal de premiere instance of Ghent, upholding as valid a contractual arrangement that included the droit de suite, confirmed that "the droit de suite is as a rule inalienable but this does not apply to transmission at death."¹²⁵

7. Auction Sales and Dealer Sales

The law's reference to "public sales" means sales made through an auctioneer.¹²⁶ Belgium has preserved the limitation of the droit de suite to auction sales, while many other countries have extended the law, at least on paper, to cover some private sales as well.¹²⁷

8. Collection of the Droit de Suite

In Belgium, the seller, and buyer, organizer or director of the public sale are jointly liable for the payment of the royalty. Article 3 of the Belgian Law provides: "The vendor, purchaser, and the public official conducting the sale shall be jointly answerable to the artist or his successors in title in respect of the levy provided for by this Law."¹²⁸ They may free themselves from that liability by collecting the droit de suite at the time of the sale.¹²⁹

¹²⁴ Id. at 41, 163 n. 221 (citing 1945 Journal des Tribunaux [J.T.] 367, Belg.).

¹²⁵ Fawcett, supra note 3, at 42.

¹²⁶ Id. at 78.

¹²⁷ Id. at 82. See Table 1 for a comparison of types of sale covered.

¹²⁸ See also Royal Decree of September 23, 1921, Regulating the Application of the Law of June 25, 1921, art. 1 [hereinafter Belgian Decree of 1921], reprinted in Fawcett, supra note 3, at 205.

¹²⁹ Id. at art. 2.

The law provides for a registry to be kept at Brussels, in the Department of Public Instruction. This registry records deposits and payments with regard to the droit de suite.¹³⁰ The royalty must be deposited with the official charged with keeping the official register by at least eight days after the sale, accompanied by a form declaring the date and place of the sale, the title of the works sold, name of the author, sales price, royalty collected, and other information.¹³¹

The royalty is paid to the artists or their successors, or to an association designated as their agent by the agent charged with collection of the droit de suite, upon proof of their identity.¹³² Twice a year, the Moniteur Belge publishes a list of artists who have given power of attorney to an association, such as SABAM, to collect in their name the droit de suite.¹³³ The government agent charged with collecting the royalty does not have to verify that the sum presented to him is in accordance with the rate of levy required by law; he or she merely pays the sum received to the artist or agent, "and any dispute should be decided between the parties concerned, amiably [sic] or by legal proceedings."¹³⁴

¹³⁰ Id. at art. 3.

¹³¹ Id. at art. 4.

¹³² Id. at art. 5.

¹³³ Id. at art. 6.

¹³⁴ Id. at art. 7.

D. GERMANY

The Federal Republic of Germany incorporated droit de suite into article 26 of the copyright law in 1965.¹³⁵ In Germany the resale proceeds right is known as Folgerecht,¹³⁶ but the term droit de suite is often used.¹³⁷ Under German law, the droit de suite is defined as the right of an author of an artistic work to an interest in the sale price of the original of the work after a primary sale or other alienation by the artist, limited to the duration of the copyright protection of the work.¹³⁸

Although Germany was one of the first countries to consider droit de suite, it did not pass a law until the concept had been thoroughly studied and debated for more than fifty years.

1. Development of the Law

It is reported that the first legislative proposal for a German droit de suite was introduced as early as 1910.¹³⁹ Two years later, in 1912, a member of the Bavarian Parliament called for introduction of the droit de suite. The minister of cultural affairs "pointed out the anticipated difficulties of the

¹³⁵ German Copyright Act of 1965 [BGBl.I 1273], §26, reprinted in Friedrich-Karl Beier and Gerhard Schricker, German Industrial Property, Copyright and Antitrust Laws, 6 IIC Studies in Industrial Property and Copyright Law 121 (1983) [hereinafter German Law].

¹³⁶ Max Planck Study, supra note 4, at VI-2 and 3.

¹³⁷ Id. at VI-3. The term droit de suite also refers in German copyright law to participation of the author of literary or musical works in increases of value which occur after a grant of the copyright license. Predominantly, however, the term Folgerecht is reserved for the right of an artist to participate in the price received on further resale of his or her work. Id.

¹³⁸ Id. at VI-2.

¹³⁹ Ferdinand Avenarius, Urheberschutz und Urheberschatz, Flugschriften des Durerbundes 65, Flugschrift zur Ausdruckskultur 22 (1910), cited in Max Planck Study, supra note 4, at VI-13 n. 21.

practical realization and promised to have this considerable idea further evaluated."¹⁴⁰ The idea was proposed in more detail in 1913¹⁴¹ calling for the artist to get between 20 and 25 percent of the difference between the purchase price and the selling price.

Other proposals followed.¹⁴² The idea of a German droit de suite was strengthened by the introduction of laws in France and Czechoslovakia, and by attention the idea received internationally at the congresses of the Association Littéraire et Artistique Internationale and the League of Nations in the mid-1920s, and the Rome Conference of the Berne Convention in 1928.¹⁴³ In 1929, a complete study was made of the introduction of the droit de suite into German law.¹⁴⁴

In 1932, the Reich Ministry of Justice published, in cooperation with the Austrian government, an official draft for a reform of the German and Austrian Copyright Laws, which included a droit de suite. The draft called for three percent of the sales price to be paid to the author or his heirs where the sales price was higher than 500,-RM, and the sale took place before expiration of the copyright. The obligation did not apply, however, if the price received

¹⁴⁰ Max Planck Study, supra note 4, at VI-14 (citing Minister for cultural affairs von Knilling, and Member of parliament Hubsch, Verhandlungen der Kammer der Abgeordneten des Bayerischen Landtags, 36. Landtagsversammlung, 1. Session in 1912, stenographische Berichte, vol. 4, p. 291 et seq.).

¹⁴¹ Max Planck Study, supra note 4, at VI-14 and 15 (citing Otto Opet, Der Wertzunwachsanspruch des bildenden "Künstlers", Annalen des Deutschen Reichs 368-85 (1913)).

¹⁴² See Max Planck Study, supra note 4, at VI-15.

¹⁴³ Id. at VI-16.

¹⁴⁴ Id. (citing Justus Koch, Über die Einführung des "Droit de suite" in Deutschland, UFITA II 1929, p. 279-99).

after subtraction of the droit de suite was not higher than the price paid, i.e., if there were no increase in value. ¹⁴⁵

The proposal to incorporate the droit de suite into German law was met with intense criticism. There was heavy opposition from the German art trade. Commentators Georg Klauer, Hans Otto de Boor, and Willy Hoffman favored removing the droit de suite from the legislative draft, calling instead for further observation of how the proceeds right would function in foreign countries. ¹⁴⁶ Several well-known artists, including Paul Klee, Emil Nolde, and Ernst-Ludwig Kirchner, even signed a petition asking the Reich Ministry of Justice not to include the droit de suite in the law. ¹⁴⁷

On the basis of that development, the Ministry of Justice decided not to introduce the droit de suite into the draft of 1933. There seemed no way to implement the droit de suite effectively, or with benefits that would outweigh the burdens. The reform of German copyright law was abandoned until after World War II. ¹⁴⁸

Following the Brussels Conference for the Revision of the Berne Convention in 1948, where the droit de suite was introduced into article 14bis of the Berne Convention, efforts to revise German copyright law resumed. However, the Federal Ministry of Justice in Germany published a non-official draft in 1954 expressly rejecting the droit de suite. ¹⁴⁹

¹⁴⁵ Id. at VI-18 and 19.

¹⁴⁶ Id. at VI-19 and 20.

¹⁴⁷ Id. at VI-20 (citing Wilhelm F. Arntz, "Gewinnbeteiligung für Künstler" Das Schönste, No. 11, 1960, p. 11; Hans Wicher, Folgerecht und Versteigerungsrecht, UFITA 31, 1960, p. 207 (219)).

¹⁴⁸ Id. at VI-20 - VI-22.

¹⁴⁹ Id. at VI-22.

Following the 1954 draft, the constituency in favor of droit de suite began to verbalize its views to the Federal Ministry of Justice. These groups included the Professional Association of the Artists of Berlin, the Federation of German State Associations of Artists, the Academy of Sciences and Literature, and the German Association for Industrial Property and Copyright. In contrast, the Professional Association of German Auctioneers opposed the idea. ¹⁵⁰

In a meeting held on January 17, 1955, the Federal Ministry and the professional associations decided that the droit de suite was feasible. A 1959 reform draft again included the proceeds right. ¹⁵¹ In 1962, the German government published an official draft of the Copyright reform bill, incorporating the droit de suite in article 26.

The legislative history reveals that the reasons for this movement in Germany on the issue included: the disadvantages under traditional copyright law for visual artists as compared to literary authors and composers; the fact that the droit de suite had been introduced in France, Belgium, Italy, and in art. 14bis of the Berne Convention; and the basic moral justifications for the droit de suite. ¹⁵² One German study from this period indicated that works of art of recognized value generally increase in price proportionally to their age, i.e., roughly 10 times in 10 years, 20 times in 20 years. ¹⁵³

¹⁵⁰ Id. at VI-23.

¹⁵¹ Id. at VI-24 - VI-26. Again, the proposal received negative reaction from various auctioneers associations.

¹⁵² Id. at VI-26.

¹⁵³ Id. at VI-5 (citing Comment of the Bund deutscher Landesberufsverbände bildender K nstler, M nchen, on arts. 26, 36 of the draft of a copyright act and an act of related rights (Copyright Act), 1964, encl. 1, p. 2).

On September 9, 1965, the new German Copyright Law was proclaimed in the Federal Gazette. Most of its articles, including art. 26 on droit de suite, became effective on January 1, 1966.¹⁵⁴

2. Measuring the Proceeds Right

For the sake of simplicity and privacy, the German draft followed the French and Belgian lead in disregarding the increase in value, and basing the droit de suite on the total resale price.¹⁵⁵ It was felt that a different construction would necessarily involve identifying the client, which it was feared "would lead to a decrease in sales, because the sellers of works of art in many cases consider their anonymity of utmost importance."¹⁵⁶

As the Germans had carefully studied droit de suite for many years, they were aware of another strong reason to base the right on the resale price: ease of administration. One study noted:

...one points to the French and Belgian examples. In France as well as in Belgium the droit de suite is formulated as a pure participation in the sale price. There the droit de suite brings considerable results -- 1959 in France about 200,000,-German Marks-, and in Belgium about 20,000,-German Marks-- while in Italy the droit de suite which there is given in form of a participation in the increase in value until now has not brought any income.¹⁵⁷

Nonetheless, the proposal was heavily debated after its referral to the Federal Council, and some were particularly critical that the statute had abandoned the basic concept that an artist should participate in an increase in

¹⁵⁴ Id. at VI-34.

¹⁵⁵ Id. at VI-27. See Table 1.

¹⁵⁶ Id. See also id. at VI-44.

¹⁵⁷ Id. at VI-56 - VI-57.

value of works. As in France and Belgium, however, this finally was seen as a necessary compromise.

Originally the German law set the proceeds at one percent, but now the right is set at a flat rate of five percent of the sale price. There is no obligation to pay the Folgerecht if the sale price is less than 100 German marks.¹⁵⁸

3. Foreign Authors

Under Article 121(5) of the copyright law, the droit de suite is available to foreign nationals if the state of which they are nationals grants to German nationals an analogous right, according to a notice made by the Federal Minister for Justice in the Official Bulletin of Federal laws.¹⁵⁹

4. Term

In Germany, as in France and Belgium, the duration of the right is the same as for other economic rights an author enjoys: The life of the author, plus fifty years.¹⁶⁰ The claims of the author to the right, however, would expire after ten years.¹⁶¹ The reason for this limitation is that German dealers are required to keep their records and books for ten years.

5. Works

The law applies to resales of originals of artistic work. The Folgerecht does not apply to architectural works and works of applied art.¹⁶²

¹⁵⁸ German Law, supra note 135, at §26(1).

¹⁵⁹ Benvenuto Samson, The New Regulation of the "Droit de Suite" in the Federal Republic of Germany, 77 *Revue Internationale du Droit D'Auteur* 38, 56 (1973).

¹⁶⁰ Fawcett, supra note 3, at 286. See Table 1.

¹⁶¹ German Law, supra note 135, at §26(7).

¹⁶² Id. at §26(8).

6. Inalienability

The artist may not in advance waive his or her right to the participation.¹⁶³ The expectancy may not be the subject of a judicial execution, and any disposition of the expectancy is without legal effect.¹⁶⁴

7. Auction Sales and Dealer Sales

The German law applies to resales involving art dealers and auctioneers. Unlike France, which amended its law in 1956 to apply to dealers but never developed implementing rules to do so, the German law applied to galleries from the start. Article 26 states that the droit de suite will be collected if an art dealer participated in the transaction "as purchaser, vendor, or agent."¹⁶⁵

Its practical application, however, was proven impossible due to the refusal of art dealers-- and auctioneers-- to supply any information concerning the sale of works, proceeds from the sale, or the identify of the seller. The law contained no provision concerning the obligation to provide information.¹⁶⁶

Amendments to the law, effective Jan. 1, 1973, provided the artist with the right to obtain information from a dealer or auctioneer through whom a specific work of art had been sold.¹⁶⁷

¹⁶³ Id. at §26(2).

¹⁶⁴ Id.

¹⁶⁵ Id. at §26.

¹⁶⁶ See generally Wilhelm Nordemann, Ten Years of "Droit de Suite" in Federal Germany, 91 Revue Internationale Du Droit d'Auteur 76 (1977).

¹⁶⁷ The amendments to the law were partly a result of the Judgment of June 7, 1971, Federal Supreme Court, Germany, holding that auctioneers or dealers who were bound by an obligation of professional confidentiality could refuse to reveal the name, capacity, or address of the seller, but only if they paid the droit de suite themselves. See Fawcett, supra note 3, at 130.

As late as 1977, however, four years after the amended provisions went into effect on January 1, 1973, the droit de suite in Germany still had not been put into practical effect, and dealers still had not paid a resale royalty under the law.¹⁶⁸ Art dealers associations announced, in fact, that their dealer-members would boycott artists who joined Bild-Kunst (the German art collecting society) or who raised a claim under the droit de suite.

Finally, in the early 1980s, German artists began receiving payments from art dealers and auctioneers. This was achieved not only through the development of Bild-Kunst, but also through agreements struck between Bild-Kunst and organizations representing German art dealers and auctioneers.

8. Collection of the Droit de Suite: The Artists' Societies

Collection of the Folgerecht in Germany is handled by Bild-Kunst, an artists' rights licensing and collection organization similar to and associated with SPADEM, the French artists' rights society.¹⁶⁹ Bild-Kunst was founded in 1978, in response to pressure from the Bundesverband Bildender Künstler (Federal Association of Visual Artists) and the Deutscher Künstlerbund (German Artists Association).¹⁷⁰ The purpose of Bild-Kunst is to assert copyright-based exploitation rights on behalf of artists, which means collecting the money and passing it on to the artists. Bild-Kunst originally was founded to assert the subsequent exploitation resale royalty rights, and now handles reproduction rights and broadcasting or re-broadcasting rights, as well.¹⁷¹ The

¹⁶⁸ Nordemann, supra note 166, at 86.

¹⁶⁹ Merryman, supra note 84, at 214.

¹⁷⁰ German Commission for UNESCO, "Survey on the Economic Situation and Social Status of the Artist in Germany" 1 (1992).

¹⁷¹ Id. at 2.

organization consists of artists, designers, and photographers who bring their rights into Bild-Kunst.

The German law requires certain claims to be asserted through a collecting society such as Bild-Kunst. Through a collecting society, the author may request information from a dealer or auctioneer as to what originals of the author's works have been resold during the last calendar year, and also request information on the seller's name and address and the sale price, so long as this information is strictly necessary for the author's claim to be made. The dealer or auctioneer may refuse to reveal the seller's name and address if the seller pays the participation due to the author. If there is reasonable doubt that the information provided by the dealer or auctioneer is accurate or complete, the collecting society may demand access to account books or other documents.¹⁷²

Notwithstanding the threat of dealers and auctioneers to boycott artists who joined Bild-Kunst, by 1977, Bild-Kunst had nearly 1,000 members.¹⁷³

In spite of its growing membership, Bild-Kunst had a hard time getting started with enforcement because it had not collected enough receipts to initiate legal action.

In the late-1970s, however, Bild-Kunst began to receive revenue from other sources that could be used for enforcing the droit de suite in test cases. The organization also grew stronger after 1975, with the influx of French artists who could claim the droit de suite in Germany through Bild-Kunst, following the reciprocity agreement between France and Germany.¹⁷⁴

¹⁷² German Law, supra note 135, at §§26(3)-(6).

¹⁷³ Nordemann, supra note 166, at 86.

¹⁷⁴ Id. at 88.

In the mid-1970s Bild-Kunst began to arrange with art dealers for the payment of a lump sum to cover claims under the droit de suite rather than individual distribution based on individual sales.¹⁷⁶

On September 29, 1980, an agreement was reached between Bild-Kunst and the art trade organizations, including the German Art Dealers Association (which includes auctioneers).¹⁷⁶ The agreement covers both droit de suite and the art trade's contributions to Social Security.¹⁷⁷ A 1980 statute, effective on January 1, 1983, extended the German Social Security system to artists, who previously had been ineligible to collect from it.¹⁷⁸

Under the 1980 agreement, dealers and auctioneers pay one percent of sales of twentieth century art to Bild-Kunst, and Bild-Kunst distributes the monies to artists for proceeds rights. Fifty percent of the money so collected is paid, as the art trade's contribution, into a special social security fund for artists, the Artists' Social Security Fund in the Federal Republic of Germany. Fifty percent is distributed to artists able to claim the droit de suite.¹⁷⁹ In 1989, Bild-Kunst collected approximately DM 2.9m for resale proceeds rights.

In Germany today, the five percent resale royalty under the law has to a large extent been replaced by this operating agreement between the

¹⁷⁶ Id.

¹⁷⁶ Fawcett, supra note 3, at 133 (citing CISAC Document CIAGP/80/882 (1980)).

¹⁷⁷ Id. at 132.

¹⁷⁸ Id.

¹⁷⁹ German Commission for UNESCO, supra note 170, at 2.

professional association of German art dealers and Bild-Kunst mandating a one percent override charged on all sales of contemporary art in Germany.¹⁸⁰

Bild-Kunst uses this one percent partly to pay royalties and partly to fund an artists' welfare or social security fund. Bild-Kunst Managing Director, Gerhard Pfenning, confirms this. Mentioning that the contractual arrangement reached a decade ago is the arrangement most art dealers choose, Pfenning also writes that the German law's provision granting artists access to information is an instrument whose "existence" is "necessary," but which hasn't actually been used since most information now is given voluntarily. "Even in our contract with galleries that organizes a special way of collecting droit de suite payments," writes Pfenning, "all the necessary information is given by the tax accountants of the galleries and double-checking has not been necessary."¹⁸¹

Bild-Kunst estimates that in Germany 50 percent of resales qualifying for the Folgerecht are auction sales and 50 percent are dealer sales (40 percent gallery sales and ten percent "art agent" sales).¹⁸²

Bild-Kunst retains ten percent of collected resale royalties to cover administrative costs, and another ten percent either for a social fund or to support young creative artists. It distributes sixty-six percent of Folgerecht income to German artists, and another one-third to foreigners, mainly French artists. Of the money distributed to German artists about 30 percent goes to

¹⁸⁰ Fawcett, supra note 3, at 132. Fawcett reports that over 300 galleries and auctioneers choose the contractual solution. Id.

¹⁸¹ Letter from Gerhard Pfenning, Managing Director, Bild-Kunst, to Ralph Oman, Register of Copyrights (Aug. 27, 1992) (emphasis added).

¹⁸² Id.

artists' estates, 20 percent to living artists of "great reputation," and the remainder to other artists. ¹⁸³

E. URUGUAY, CZECHOSLOVAKIA AND ITALY

Uruguay and Czechoslovakia are unique in that their statutes apply to all categories of intellectual works, without distinction. Uruguay applies the droit de suite to "any alienation" of literary or artistic property. ¹⁸⁴ Czechoslovakia's law applies to any "transfer of a work." ¹⁸⁵ In most countries, droit de suite applies only to a specific category of works, such as

¹⁸³ Pfenning adds:

The remaining money is distributed among a great number of living artists who face the situation of the art market, i.e. a contemporary artist normally has a limited period of high creativity; the production of this period is sold at high prices. After this period which might last five to ten years the art market loses interest in his new productions and starts resaling [sic] his creative period works. Through droit de suite a large number of this kind of artists benefit from resales of their works out of earlier periods which allows them to maintain a certain standard of living...

Id.

¹⁸⁴ Uruguay's law provides:

Article 9. In any alienation, there shall be understood to be reserved, for the benefit of the author making the alienation, the right to participate in any increase in the value of the work reflected in the profits obtained by the subsequent acquirers of the work. Any agreement to the contrary shall be null and void. The percentage of participation in each case shall be twenty-five percent. In the case of collaboration of a plurality of authors, the said percentage shall, in the absence of agreement to the contrary, be divided in equal parts between the persons concerned.

Upon the death of the author, his heirs or legatees shall retain the same right until such time as the work passes into the public domain.

Uruguay Law Number 9739 Concerning Literary and Artistic Copyright of December 15-17, 1937, amended February 15-25, 1938, reprinted in Fawcett, supra note 3, at 256 (citing CLTW, Supplement 1984-86).

¹⁸⁵ As amended by the Law of December 22, 1953, the Czechoslovakian Law of November 24, 1926, cited in Fawcett, supra note 3, at 215-16.

"works of art," "figurative arts," or "visual arts." ¹⁸⁶ Manuscripts of literary and musical works are sometimes included in other countries; architectural works and works of applied art are almost always excluded. ¹⁸⁷

Czechoslovakia's law is also unique in that it applies where the buyer who transfers the work realizes a "socially unjustified profit" in selling the work. As amended December 22, 1953, the law allowed the artist to "exact an equitable indemnity from the buyer if...the latter realizes an excessive profit in selling the work." A 1965 amendment allows the author to "claim a fair share from any transferee if the latter obtains a socially unjustified profit from" a transfer of ownership of the work. ¹⁸⁸ The 1926 law gave the "author of a work of figurative art, with the exception of an architectural work...a right to a portion of any disproportionately large net profit obtained by the owner..." The tribunal judging by that standard could take "the financial situations of the two parties; it may award to the petitioner up to twenty percent of the profit obtained..." This right of action was available for three years counting from the day on which the claimant first knew of the sale giving rise to his right. ¹⁸⁹

¹⁸⁶ World Intellectual Property Organization and United Nations Educational, Scientific and Cultural Organization, "Study on Guiding Principles Concerning the Operation of 'Droit de Suite'" at 5 (1985) [hereinafter WIPO-UNESCO Study].

¹⁸⁷ Id.

¹⁸⁸ Czechoslovakian Copyright Law Concerning Literary, Scientific and Artistic Work, Number 35, of March 25, 1965 (emphasis added), reprinted in Fawcett, supra note 3, at 216.

¹⁸⁹ Law of November 24, 1926 (emphasis added), reprinted in Fawcett, supra note 3, at 215.

The Uruguayan formula of applying the right to any work, according to some, is "excessively broad."¹⁹⁰ Further, applying a rate of 25 percent to the increase in value has been called "excessive"¹⁹¹ and "exorbitant."¹⁹²

Czechoslovakia and Italy attempt to give the artist a percentage of the difference between the seller's purchase price and the resale price. Some commentators observe that such a yardstick perfectly harmonizes the rationale of the law with its practical implementation.¹⁹³ Commentators suggest that the difficulty in administering and enforcing the droit de suite in such a way "may help explain its disuse" in countries such as Italy.¹⁹⁴ They report that systems such as Czechoslovakia's were "doomed to failure because the practical implementation required tracking the works of art in the hands of all successive

¹⁹⁰ Fawcett, supra note 3, at 53, 166 n. 273 (citing J. Antuna, La loi uruguayenne de protection des droits d'auteur, 9 Il Diritto de Autore 570, 576 (1938)).

¹⁹¹ Id. at 112 ("[I]t is indeed excessive to deduct one quarter of the profit made by the seller. The droit de suite must not have the effect of discouraging potential investors; the first to suffer from this would be those the law has sought to protect.").

¹⁹² See id. (quoting Dr. José Antuna).

¹⁹³ Id. at 5; Merryman, supra note 84, at 216.

¹⁹⁴ See DeSanctis, supra note 23.

See also New York Hearing at 19 (statement of Jean-Marc Gutton) (calculation of droit de suite should be on total resale price, not capital gains); Id. at 101-02 (statement of Ted Feder of Artists' Rights Society) (not necessary to base royalty on percentage of profits from current sale as compared to price received from previous one, since "It is often very difficult, if not impossible, to trace the sale records of works of art" and the "experience of Italy, Portugal, Uruguay, Czechoslovakia, and California, of computing the royalty on the increase in value over the preceding sale, has not been successful"); Id. at 137 (statement of Daniel Mayer of Volunteer Lawyers for the Arts) (royalty should be assessed on "total gross price of each sale regardless of whether the work has increased in value since its last sale").

purchasers so as to permit comparison of the present sales price with the previous sales price." ¹⁹⁶

F. SUMMARY OF DROIT DE SUITE IN OTHER COUNTRIES

Although a number of countries claim to have droit de suite, examination of their legal systems ¹⁹⁶ reveals that for many the principle is never carried out. Such countries include, but are not limited to, Italy, Czechoslovakia, Uruguay, and Yugoslavia. ¹⁹⁷

The majority of countries have simply not adopted the right, but several, including the United Kingdom, and Switzerland, have recently considered or reconsidered droit de suite. Other countries, including Australia and the United States, continue to study and debate the right. Still other countries, such as Spain, ¹⁹⁸ have either enacted new laws or are revising existing ones.

On November 11, 1987, Spain passed a law recognizing a resale royalty right. The Spanish law applied a 2 percent royalty on works of art that resold for a minimum of approximately \$2,000. As first enacted the right was not descendible. Also at first the Spanish collecting society, Entidad de Gestión de Artistas Plásticos (VISUAL) only collected the royalty from auction houses. ¹⁹⁹

¹⁹⁶ Fawcett, supra note 3, at 5.

¹⁹⁸ See generally WIPO-UNESCO Study, supra note 186; Legal Protection for the Artist (H. Nimmer ed. 1971); Fawcett, supra note 3; Australian Copyright Council, supra note 21; Merryman, supra note 84.

¹⁹⁷ See Table 1.

¹⁹⁸ See Comment 6 (Javie Gutierrez Vicer, Executive Director Visual Entidad de Gestión de artistas Plásticas [hereinafter VISUAL]), App. Part I.

¹⁹⁹ Gutierrez Comment 6 at 25-6 (statement of Javier Vicer, Executive Director of Entidad [hereinafter VISUAL]), App. Part I.

The Spanish law was recently revised and since July 7, 1992, VISUAL collects 3 percent for a minimum of \$3,000. The right has been extended to inheritors and the term is life of the author plus 60 years.

The Spanish law stipulates that the resale royalty is to be collected in both galleries and auction houses, and VISUAL is now negotiating an agreement with the 5 Galleries Association in Spain to collect an agreed upon amount each year. It is expected that this agreement will be signed in 1993.²⁰⁰

Mr. Vicer reports that VISUAL collected \$50,666 in U.S. dollars in 1991 and expects to collect four times that much this year.²⁰¹

G. EFFORTS TO IMPLEMENT THE DROIT DE SUITE INTERNATIONALLY

The rules governing the droit de suite vary from nation to nation. Hopes for an international standardization of the droit de suite led to efforts to incorporate the right into an international convention, such as the Berne or Universal Copyright Conventions.²⁰² There is still the belief that, "[L]eaving aside the differences, certain factors common to all the national legislations concerned can be singled out which, by revealing the same trend, can serve as a basis for the internationalization of 'droit de suite' and for drawing national laws on the subject closer to one another."²⁰³ The right did not

²⁰⁰ Letter from Javier Guttierrez Vicer, Managing Director VISUAL to Marilyn J. Kretsinger, Assistant General Counsel, U.S. Copyright Office (November 17, 1992).

²⁰¹ Id.

²⁰² Fawcett, supra note 3, at 50.

²⁰³ WIPO-UNESCO Study, supra note 186, at 3.

achieve recognition in the UCC,²⁰⁴ however, and there are only statements of principle in the Berne Convention. Part of the difficulty of incorporating the right into Berne lay in establishing a principle for treatment of foreign authors when the character of the droit de suite varies so widely from country to country.

1. Berne Convention

In 1928, at the Rome Conference on revision of the Berne Convention, the French, Belgian, and Italian delegations proposed that the droit de suite be incorporated into the Convention.²⁰⁵ Subsequently, at the Brussels Conference, the Belgian administration proposed including the droit de suite in Berne and promoting it to the rank of rights accorded by the Convention.²⁰⁶

Under the Belgian proposal, all member countries would undertake to recognize the droit de suite in their statutes in their own manner, and the right would be extended to foreign authors on the basis of national treatment.²⁰⁷ National treatment was not unanimously favored, however, due to the limited number of countries that had incorporated the droit de suite into their own statutes.²⁰⁸ Under an Austrian proposal, the droit de suite would have been recognized on the basis of reciprocity.

²⁰⁴ The Universal Copyright Convention, to which the United States belongs effective September 16, 1955, contains no resale royalty provision. Under the UCC, therefore, regulation of the right is left up to each signatory nation's legislation.

²⁰⁵ Recommendation No. 3 of the Rome International Conference for revision of the Berne Convention, cited in Fawcett, supra note 3, at 93 n. 518.

²⁰⁶ Fawcett, supra note 3, at 94 (citing La Protection Internationale des droits voisins du droit d'auteur (pt.3), 53 Droit d'Auteur 133, 136-38 (1940)).

²⁰⁷ Fawcett, supra note 3, at 94.

²⁰⁸ Id.

Given these differences, a committee of experts meeting in Samaden proposed in 1939 to incorporate the droit de suite into a related convention, rather than Berne itself. The related convention would abide by the principle of assimilation; member countries in which a sale took place would accord the droit de suite to nationals of other member countries, while in the country of origin of the author, only the national law could apply. The Samaden draft, which contained only a simple recognition of the principle of droit de suite, was abandoned when war broke out. ²⁰⁹

The 1948 Brussels Conference provided explicit recognition of droit de suite in the Berne countries for the first time in Article 14bis. ²¹⁰ Article 14bis allows for reservations in national laws and subjects the droit de suite to the principle of reciprocity: Berne members may introduce the droit de suite into their own laws, and if they do so, a foreign artist can benefit from it if his national laws grant such protection, but only "to the extent permitted by the country where [the] protection is claimed." One commentator has noted that states vary in determination of the scope of the reciprocity requirement; some feel that mere recognition of the principle of Article 14bis, paragraph 2

²⁰⁹ Id. at 95.

²¹⁰ The Stockholm conference later modified the numbering of the Berne Convention without modifying the text, and article 14bis became article 14ter. Article 14ter provides:

(1) The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.

(2) The protection provided by the preceding paragraph may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed.

(3) The procedure for collection and the amounts shall be matters for determination by national legislation.

Art. 14ter, para. 2, reprinted in Fawcett, supra note 3, at 200.

is sufficient. Others require a tangible expression of reciprocity.²¹¹ For example, on December 19, 1962, the Committee on the Droit de Suite for Foreigners in France decided that a state "even if its legislation is adequate in theory, cannot be considered as protecting the droit de suite if the legal arrangements it has established have not been properly applied."²¹²

Berne leaves to the national legislatures the task of providing for administrative procedures and percentages to be collected.²¹³

Even with its limited statements of principle, the Berne Convention is the only international instrument governing implementation of the droit de suite in relations between signatory nations.²¹⁴

If each nation can impose special rules for extending the droit de suite to foreigners, such rules cannot be applied in relations between signatories to the Brussels (or later) text of Berne, once reciprocity is established.²¹⁵ Such national rules can apply only between nations not party to any international convention or which have signed only the UCC, or pre-Brussels revision.²¹⁶ Without specific rules for the droit de suite, the

²¹¹ Fawcett, supra note 3, at 73. See also WIPO-UNESCO Study, supra note 186, at 57.

²¹² Fawcett, supra note 3, at 99. See also id. at 98-99 (discussing whether art. 14 creates special rule which denies droit de suite to artists who are granted other prerogatives of authors' rights under the Convention and whether art. 14 constitutes obligation to grant national treatment if effective protection is granted in country of origin).

²¹³ Id. at 95.

²¹⁴ Id. at 102.

²¹⁵ Id.

²¹⁶ Id. at 103. See WIPO-UNESCO Study, supra note 186, at 57 ("For countries bound by an instrument predating the Brussels Act, such as the Rome Act of 1928, the principle of the assimilation of members of the Union to nationals (continued...)")

operation of the right will be governed by the rules set out in each nation's law regarding treatment of foreign authors.²¹⁷ France, Belgium, and Germany have adopted specific texts on application of the droit de suite to foreigners.²¹⁸

There has been further discussion of the extent of droit de suite and some discussions about extending the right. In 1983, the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the World Intellectual Property Organization (WIPO), which administer the UCC and Berne Conventions, respectively, conducted a joint survey of countries with an art resale royalty right. In 1985, WIPO and UNESCO conducted a second study, "Draft Guiding Principles on the Operation of Droit de Suite." In 1986, at a Paris meeting of a Committee of Governmental Experts on Works of Visual Art convened by UNESCO and WIPO, several delegates favored introducing the right as one of the basic rights of artists. However, the prevailing consensus was that there needed to be further study of the problems of implementation and the question of the effect on the art market.²¹⁹

2. Model Law of Tunis

In 1976, a Committee of Governmental Experts charged with developing a model law on copyright for the use of developing countries drafted the Model Law of Tunis. The law was adopted on March 2, 1976.

²¹⁶(...continued)
could not apply to 'droit de suite,' since that right was not an author's right under the terms of the Rome Act. It was only with the Brussels Act that it came to be recognized as an ingredient of copyright.").

²¹⁷ Fawcett, supra note 3, at 103.

²¹⁸ Id. See supra notes 42-44 and accompanying text (discussing French law); notes 118-19 and accompanying text (discussing Belgian law); note 159 and accompanying text (discussing German law).

²¹⁹ Australian Copyright Council, supra note 21, at 5.

Article 4bis of the Tunis Law provides that authors of graphic and plastic works (and manuscripts) ²²⁰ have an inalienable right, notwithstanding any transfer of the original work, to share in the proceeds of every sale of the work or manuscript made at public auction or through a dealer. ²²¹ The model law does not apply to architectural works or works of applied art. ²²²

Although a number of the developing countries have adopted droit de suite and have passed regulations based to some extent on the Tunis Model Law, ²²³ it is questionable whether any of these laws have been enforced.

3. European Community Council Directive

The European Community has taken several steps toward harmonization of the varied resale royalty laws among its Member States. These efforts, which began in the early-1970s, have culminated in a proposed EC Council Directive supporting the droit de suite. ²²⁴

²²⁰ Some argue that because the Tunis Model Law mentions manuscripts "only incidentally, being added to graphic and three-dimensional works, it is to be inferred that, in the minds of those who drafted the text, manuscripts do not come into the category of graphic and three-dimensional works." WIPO-UNESCO study, supra note 186, at 23. The WIPO-UNESCO Draft Guidelines do not support extension of the droit de suite to manuscripts, as being "no more than material support for the work," having a "sentimental" or historical value, but having "no more intrinsic literary or musical value than a copy of the published work or of the printed score." Id. at 23-24.

²²¹ Model Law of Tunis, supra note 15.

²²² Id.

²²³ WIPO-UNESCO Study, supra note 186, at 72.

²²⁴ See EEC Treaty, Arts. 100 and 189(3) (concerning Council Directives). For a good discussion of copyright law in the European Community, see Theodore M. Shapiro, Droit de Suite: An Author's Right in the Copyright Law of the European Community, 4 Ent. L. Rev. 118 (1992).

In 1972, the Intergovernmental Conference on cultural policies in Europe met in Helsinki, and the delegates of some 30 European countries recommended to Member States that they accord to artists the droit de suite on public sales.²²⁵ On May 13, 1974, the European Parliament passed a resolution requesting the Commission to propose measures to harmonize the domestic law concerning the protection of cultured objects, as well as copyright and "neighboring or related" rights.²²⁶

In 1975, the Council of Europe sponsored a seminar for the encouragement of artistic creations. The rapporteur found that the diversity of the existing droit de suite systems results in distortions that undermine the competitive forces of the free market in Europe, and urged harmonizations of the resale right.²²⁷ In 1977 and 1982, the Commission tabled draft proposals on EEC action in the "cultural sector" which recommended general application of the droit de suite. It was felt that the inequity between artists in various EC countries with and without the resale right distorts competition within the meaning of Article 101 of the EC Treaty, and is inadmissible for the functioning of a common market.²²⁸

The Commission held a hearing on droit de suite on November 21, 1991, in Brussels. A majority of those present saw harmonization of the droit de suite

²²⁵ Wladimir Duchemin, Resale Right Situation, Particularly in Europe, 192 Interauteurs 94, (1981).

²²⁶ 10 OJ No. C62 of May 30, 1974. See also 5 Bull. of Eur. Comm. point 2406 (1974).

²²⁷ Duchemin, supra note 222, at 94.

²²⁸ See Bull. of Eur. Com. (June Supplement) (1977); Bull. of Eur. Comm. (June Supplement) (1982). See also Adolf Dietz, The Harmonization of Copyright in the European Community, 16 IIC 379 (1985); Gerhard Schricker, Harmonization of Copyright in the European Economic Community, 20 IIC 466 (1989).

at a Community level as a necessary step. A minority, which emphasized the right's optional character in the Berne Convention, took the view that if certain Member States had introduced the droit de suite and now felt that it caused distortion of competition, it was up to those Member States to end the distortion.²²⁹

In a proposed EC Commission Council Directive, the EC advocates inclusion of certain elements of a droit de suite system as "the minimum needed to assure the reconciliation of the statutes of member states regarding the droit de suite."²³⁰ In its proposal, the EC opts for a royalty of five percent of the sales price, that would "not be payable if the seller is able to prove that he acquired the work at a price higher than, or equal to, the sales price."²³¹ The right would apply to auction sales, sales through dealers, and sales between private parties, and would continue for fifty years after the author's death.²³² This EC proposed directive contains a significant provision to ensure that the art market would not shift to other countries as a result of the application of droit de suite within the Community. Where original art is exported to a third country, the directive "would require payment of the droit

²²⁹ Facsimile from Directorate General for Internal Market and Industrial Affairs to the Delegation of the Commission of the European Communities, Washington D.C. (unpublished) (Sep. 7, 1992).

²³⁰ Commission of the European Communities, Proposed Council Directive, reprinted in Fawcett, supra note 3, at 259.

²³¹ Id.

²³² Id.

de suite on the same terms as in the interior of the Community, the amount being calculated on the basis of the value declared for customs." ²³³

A majority of those present at the 1991 Commission hearing on droit de suite expressed hope that the Community would work toward greater international harmonization of the resale right, particularly in the United States and Japan. ²³⁴

H. RECENT INTERNATIONAL INTEREST IN ARTISTS RIGHTS

A great deal of interest has arisen during the last few years in improving the economic and social rights of artists. Participating in this international colloquy on artists' rights have been individuals, countries, and many international organizations. Several important studies have emerged, ²³⁵ and a number of international conferences have been held, including one in Madrid and one in Helsinki during 1992.

The Madrid Conference reported on rights of artists and the circulation of art. ²³⁶ The more recent conference in Helsinki surveyed the economic and social status of artists in European Countries. In attendance at the Helsinki Conference were representatives from 30 countries and 12 international organizations, including the Council of Europe, the European

²³³ Id. at 260. See also generally E.C. Copyright Harmonization: Discussion of Authors' Resale Rights, 11 Int'l Rev. Indus. Prop. & Copyright L. 706 (1980), cited in Fawcett, supra note 3, at 115.

²³⁴ Proposed Council Directive, supra note 224.

²³⁵ See, e.g., German Commission for UNESCO, "Survey on the Economic Situation and Social Status of the Artist in Germany" (1992); Resale Royalty--A New Right for Artists 69 Australian Copyright Council 4 (1989).

²³⁶ Fourth Symposium on Legal Aspects of International Trade in Art, Institute of International Business Law and Practice, International Chamber of Commerce (forthcoming from ICC Publishing, 1993). For a brief discussion of the U.S. Report, see infra Ch. III, text accompanying note 33.

Community, UNESCO, the International Secretariat for Arts, and International PEN. Representatives from a number of artists groups from within Finland were also present.²³⁷

The Helsinki Conference participants discussed the economic and social conditions of artists in their respective countries. They noted ways in which the government currently was helping or intending to help artists. These participants noted that when compared with members of the general population with relative education and job tenure, artists do not enjoy the same economic rights unless they work in heavily subsidized areas.

Droit de suite was not part of each presentation at the Helsinki Conference. A number of representatives did propose a change in copyright law to allow artists to participate in a resale royalty. Others reported on what is being done in other areas to support artists economically and to encourage their creativity. These efforts include social security programs, tax relief, government purchase of art, and substantial government grants.

Most of the countries represented at the Helsinki Conference do not observe the droit de suite at present. There was, however, almost universal agreement that the resale royalty would be a welcome amendment to their laws. If the European Community establishes droit de suite as a harmonization issue for its membership, many countries are likely to include a resale royalty in their systems.

A review of these international studies and conference materials clearly reveals that there is international concern about the relative economic well-being of artists world-wide. The perception, if not the reality, is that

²³⁷ This Study cannot summarize the general conclusions of the Helsinki Conference. The final report is unavailable until 1993.

artists suffer economically when compared with the rest of the work force. Reports on several international conferences, including the Helsinki and Madrid Conferences, have explored artists' rights and made suggestions for improving the economic status of artists. A number of countries also have examined generally artists' rights and specifically the question of whether or not the droit de suite should be adopted. The European Community also is considering whether it should harmonize the droit de suite in its member states.

It is evident in the spirit of these discussions that the participants believe that artists are a valuable national resource and should be encouraged by their governments. A picture also emerges that, in terms of government policy, many of these countries already do more to encourage the social and economic well-being of artists than the United States currently is doing.

II. THE U.S. EXPERIENCE WITH ARTISTS' RESALE ROYALTIES

A. OVERVIEW OF THE U.S. EXPERIENCE WITH DROIT DE SUITE

Since the concept of droit de suite was first introduced in Paris in the 1920's, there have been efforts to incorporate this European concept into state or federal law in the United States.¹ To date, only California's efforts have resulted in law.² The proposal's controversial nature is due not only to opposition from dealers, museums, and others, including some artists, but also to the difficulties inherent in structuring a workable, effective, and cost-effective resale royalty scheme. The European models have had varying degrees of success. Many fear resale royalty laws would be counter-productive to artists' interests and to the well-being of the United States art market as a whole.

1. Individual Efforts

The first efforts in this country were from individual artists, writers, or lawyers who pressed for a resale royalty right through art unions, art journals, or private contracts for sales of art works.

Grant Wood generally is credited as the first major American artist to suggest that artists should profit from the increased value of their works.³

¹ See generally, Monroe E. Price, Government Policy and Economic Security for Artists: The Case of the Droit de Suite, 77 Yale L. J. 1333 (1968); Gordon P. Katz, Copyright Preemption Under the Copyright Act of 1976: The Case of Droit de Suite, 47 Geo. Wash. L. Rev. 200 (1978); Roy Bongartz, Writers, Composers, and Actors Collect Royalties -- Why Not Artists?, N.Y. Times, Feb. 2, 1975, §2, at 25, col. 2; Carl R. Baldwin, Art & Money: The Artist's Royalty Problem, 21 Art in America 20 (March-April, 1974).

² CAL. CIV. CODE §986 (West Supp. 1992).

³ Katz, supra note 1, at 203-04; Baldwin, supra note 1, at 20-23.

In 1940, after his work "Daughters of Revolution" quadrupled in value within a short period, Wood announced that his "Parson Weems' Fable" would be sold by his dealer with the stipulation that resales would bring him fifty percent of the appreciated value. ⁴

These efforts, and the European example, attracted attention from academicians in the 1960's. In a 1962 article, international law scholar Rita E. Hauser suggested including a droit de suite in U.S. copyright law. ⁵ Attorney Diane B. Schulder made a similar proposal in a 1966 article. ⁶

In the 1970's, the idea of resale royalties for visual artists in the United States started gaining real ground. The Art Workers Coalition adopted a position that included calling for a percentage of resale to revert to the artist or his or her heirs. ⁷

2. The Projansky Agreement

In 1971, attorney Robert Projansky and art dealer Seth Siegelau developed and published a sample contract, "The Artist's Reserved Rights Transfer

⁴ Katz, supra note 1, at 204; Baldwin, supra note 1, at 20-23. See also Sylvia Hochfeld, Artists' Rights: Pros and Cons, 23 ARTnews 20 (May 1975).

⁵ Rita E. Hauser, The French Droit de Suite: The Problem of Protection for the Underprivileged Artist Under the Copyright Law, 11 ASCAP Copy. L. Symp. 1 (1962).

⁶ Diane B. Schulder, Art Proceeds Act: A Study of the Droit de Suite and a Proposed Enactment for the United States, 61 Nw. U.L. Rev. 19 (1966). In Schulder's Art Proceeds Act, the resale royalty is levied upon auction or dealer sales. It is applicable only to an original work of art defined as "unique," such as painting, sculpture, drawing or illustrated manuscript. Id. at 44.

⁷ See Studio International 71-72 (Nov.-Dec. 1976) (stating position adopted by Art Worker's Coalition as summarized by Lucey Lippard). See also Baldwin, supra note 1, at 20-23.

and Sale Agreement enabling artists to collect proceeds from resales." ⁸ This contract, to be signed by artist and dealer, or artist and first purchaser, specified that the artist would receive 15 percent of the appreciated value each time a work was resold, donated, exchanged or otherwise transferred. ⁹ The Projansky form contract was promoted and distributed in the 1970's by artists' rights activists.

Today, the Projansky Agreement is not widely used. ¹⁰ Opinions differ as to whether such private contracts can legally bind subsequent owners of art works. ¹¹ Professor of Law John Merryman and Art Historian Albert Elsen argue that they cannot. ¹² "The artist can, by contract," they write, "bind only the person with whom he directly deals."

⁸ Reprinted in A Guide to the California Resale Royalties Act 23 (M. Price & H. Sandison eds. 1976) [hereinafter Projansky contract]. Projansky and Siegelau claimed to have consulted more than 500 artists, dealers, lawyers, and others before drafting this contract. Solomon and Gill, Federal and State Resale Royalty Legislation: "What Hath Art Wrought?", 26 UCLA L. Rev. 322, 327 n. 27 (1978).

⁹ Projansky contract, supra note 8, at art. 4.

¹⁰ See John H. Merryman and Albert Elsen, Law Ethics and Visual Arts 230 (1987); New York Hearing Artists on the Resale Royalties at 74, 80. (Part III of App.) (statement of art dealer John Weber) (stating that "in the early 1970's it was somewhat a fashion... to use this contract, and many artists [were]," but that "As time goes on...it became difficult for some artists just physically to keep track of where their works were. And...the gallery or the artist has to take care that the auction house understands that there is a contract, and so forth. That became somewhat awkward for some people.") Only two of Weber's 38 artists use a resale royalty contract. Id. at 74.

¹¹ At the New York Hearings, Register of Copyrights Ralph Oman asked New York art dealer John Weber, who sometimes uses the Projansky contract, whether the contract "lasts just for the second sale. It wouldn't bind a third party for a subsequent sale?" Mr. Weber answered, "No, it's binding ad infinitum. We have had third generation, and in some cases, fourth generation payments." New York Hearing at 81 (statements of Ralph Oman and John Weber). App. Part III.

¹² Merryman, supra note 10, at 230. See also Solomon and Gill, supra note 8, at 330 (enforcement of contract depends on goodwill of buyer).

Under the Projansky contract, the buyer agreed not to alienate the work without first obtaining the transferee's agreement to be bound by the terms of the original contract.¹³ In return for rights received under the contract, the artist agreed to maintain a record of each transfer.¹⁴

3. The Rauschenberg-Scull Exchange

Although interest in droit de suite was aroused among intellectuals in the early '70's, it took a well-publicized incident to kick individual efforts into legislative action in the United States, first on a state and later at the federal level.

It is the colorful Rauschenberg-Scull exchange which is credited as focusing attention in this country on the artist's often disadvantageous position in the art market.¹⁵ A collection of works owned by Robert and Ethel Scull was sold at a contemporary art auction in New York city in 1973. One 1958 painting by Robert Rauschenberg entitled "Thaw," which the Sculls had purchased years earlier for under \$1000, sold for \$85,000. After the auction, Rauschenberg reportedly said to Scull, "I've been working my ass off just for you to make that profit..,"¹⁶ and then told the Wall Street Journal, "From now on, I want a royalty on the resales and I am going to get it."¹⁷ The auction was the

¹³ Projansky contract, supra note 8, at art. 5. The agreement was binding on the parties and their successors in interest for the lives of the artist and his or her spouse plus twenty-one years. Id. at art. 16.

¹⁴ Id. at art. 6.

¹⁵ But see Solomon and Gill, supra note 8, at 356 n. 222 (writing that "Some commentators have incorrectly attributed the droit de suite movement in the United States to this incident...").

¹⁶ Merryman, supra note 10, at 217.

¹⁷ Solomon and Gill, supra note 8, at 356 n. 222.

subject of a widely distributed documentary,¹⁸ and Rauschenberg's subsequent efforts to secure a resale royalty received a great deal of media attention.¹⁹

B. THE CALIFORNIA LAW

Reacting in part to the highly publicized sale of the Rauschenberg painting, a California State Assemblyman, Alan Sieroty, drafted a bill that included a resale proceeds right. Passage of the bill was as emotionally charged as the sale of "Thaw."²⁰ Some assert that Sieroty pushed it through the legislature without gathering much acceptance in the art or legal communities. Dealers, collectors and museums claimed not to have been consulted or informed

¹⁸ "America's Pop Collector: Robert Scull -- Contemporary Art at Auction," excerpted in The MacNeil/Lehrer Report, Artist's Royalties, Library #334 Show # 2089 (Air date Jan. 6, 1977), cited in Solomon and Gill, supra note 8, at 356 n. 222.

¹⁹ Id. See Scull's Art Brings Record \$2 Million, N.Y. Times, Oct. 19, 1973, at 57, col. 1; "Artists Decide They Should Share Profits on Resale of Paintings," Wall St. J., Feb. 11, 1974, at 1., col. 4. See also Kirschenbaum, The Scull Auction and the Scull Film, 39 Art Journal 50 (Fall 1979).

²⁰ See Merryman, supra note 10, at 232 (California law opposed by "outraged" museums, collectors, and dealers and vehemently defended by artists and artist-support organizations such as Bay Area Lawyers for the Arts, Artists' Equity, and Artists for Economic Action) (citing Hochfeld, Legislating Royalties for Artists, ARTnews, Dec. 10, 1976, at 52; Bates, Royalties for Artists: California Becomes the Testing Ground, N.Y. Times Arts and Leisure Section, Aug. 14, 1977, at 1; and Gay Weaver, Controversy Stirred up over Artists' Resale Payments, Palo Alto Times, Nov. 11, 12, and 13, 1976, at 14, 15, and 16, respectively).

about the bill.²¹ Others respond that the bill was publicized and hundreds of artists were involved.²²

The Governor of California signed the Artists' Resale Royalties Act into law in September 1976.²³ The Act, effective January 1, 1977, became the first American statute to incorporate droit de suite.

1. Analysis of the Law

The California law mandates a five percent royalty of the resale price to be paid to the artist when a work is resold in California, or resold anywhere by a California resident.²⁴ The Act is applicable only if at the time of resale the artist is either a citizen of the United States or a resident of

²¹ See, e.g., Merryman, supra note 10, at 231 (stating that bill was enacted "without consulting the art community beyond artists and enthusiasts who helped draft the bill and supported it") (citing Francione, The California Art Preservation Act and Federal Preemption by the 1976 Copyright Act, 31 Copyright L. Symp. (ASCAP) 105 (1984)); Letter from California legislative counsel George H. Murphy to Assemblyman Alan Sieroty (Aug. 30, 1976) (opining that law as drafted would be constitutional only as applied to sales occurring in California); Hochfeld, supra note 20, at 52-54 (reporting that California Department of Finance recommended to governor that bill be vetoed as too expensive to administer and that some California dealers claimed to have learned of the bill in September 1976 after its signature by the Governor).

²² See Solomon and Gill, supra note 8, at 334 n. 82 ("With a total of seven amendments by both houses of the California legislature, at least three press releases sent out by Assemblyman Sieroty, sponsor of the legislation, the consequent monitoring of the bill by the press, and the prior knowledge and involvement of hundreds of artists, it is mystifying that the bill 'sneaked by' the art establishment in California").

²³ CAL. CIV. CODE §986 (West Supp. 1992).

²⁴ The subsection provides in part:
§ 986. Work of fine art; sale...
(a) Whenever a work of fine art is sold and the seller resides in California or the sale takes place in California, the seller or the seller's agent shall pay to the artist of such work of fine art or to such artist's agent 5 percent of the amount of such sale.
CAL. CIV. CODE §986(a) (West Supp. 1992).

the State of California for a minimum of two years.²⁵ The right to the five percent resale royalty is waivable only by written contract for an amount in excess of five percent.²⁶ Artists can therefore contract for a higher percentage of the resale price, but not a lower one.²⁷ An artist may assign the right to collect the royalty payment to another individual or entity, but the assignment will not have the effect of creating a waiver.²⁸ In 1982, in anticipation of establishment of an artists' collecting society, such as those that exist in Europe, the California legislature amended the Resale Royalty Act, modifying the prohibition of a waiver of the right. A transfer for the purpose of facilitating collection through such a society now lawfully could be done.²⁹

²⁵ Id. at §986(c)(1) (as amended effective July 1, 1983).

²⁶ Section 986(a), as amended effective July 1, 1983, provides in part:

"The right of the artist to receive an amount equal to 5 percent of the amount of such sale may be waived only by a contract in writing providing for an amount in excess of 5 percent of the amount of such sale."

²⁷ Legislators feared that waivers would otherwise be required as a matter of course.

²⁸ Nimmer suggests this means the seller obligated to pay the royalty may not also be assignee of the artists' royalty right. "Does it also prohibit the buyer from being such an assignee?" asks Nimmer. "If the waiver limitation is to be meaningful, it is submitted that an assignment of the artist's royalty rights to either the buyer or the seller, or to any entity which either controls, should be held invalid." 2 M. Nimmer, Nimmer on Copyright 8-379 (1991).

²⁹ San Francisco Hearing at 8-9 (statement of Professor Thomas Goetzl). App, Part II. Professor Goetzl endorses a private system of collection with ASCAP-like societies "to take a transfer of the rights from the artist for the purpose of collecting royalties." Id. at 8. [The official transcript of the San Francisco Hearing on Artists' Resale Royalties is reprinted in Part II of the Appendix to this Report. All future references to that Hearing will be App. Part II.]

The California law applies only to resales of "fine art"³⁰ occurring during the lifetime of the artist or until 20 years after his or her death,³¹ where the gross sales price equals or exceeds \$1000, and equals or exceeds the prior purchase price paid by the seller.³² A resale by an art dealer to a purchaser within ten years of the initial sale of the work by the artist to an art dealer will not be subject to the royalty requirement, provided all intervening resales are between art dealers.³³

The seller must locate and pay the royalty to the artist.³⁴ If the seller is unable to locate the artist within 90 days, the royalty must be transferred to the California Arts Council,³⁵ where it is held in the artist's name for seven years.³⁶

Failure to comply subjects the seller to an action for damages "within three years after the date of sale or one year after the discovery of the sale, whichever is longer."³⁷

³⁰ Fine art is defined in the Act as "original painting, sculpture, or drawing or an original work of art in glass." Id. at §986(c)(2).

³¹ Id. at §986 (a)(7) and (b)(3).

³² Id. at §986 (b)(2) and (4).

³³ Id. at §986 (b)(6).

³⁴ Id. at §986 (a)(1).

³⁵ Id. at §986 (a)(2).

³⁶ Id. at §986 (a)(4) and (5).

³⁷ Id. at §986 (a)(3). This aspect represents a major difference between the French and the California droit de suite laws: in France, the Union of Artistic Property (SPADEM), a private organization whose members are the majority of French artists, collects payments due artists through use of public auction registers and catalogs, while in California, the burden is on the individual artist to bring suit. See Solomon and Gill, supra note 8, at 326, 335. (continued...)

2. Impact of the California Law

a. The BALA Study. During the summer of 1986, the California Bay Area Lawyers for the Arts conducted a study of the impact on the California art market of California Civil Code Section 986.³⁸ Surveying visual artists, galleries and auction houses with written questionnaires, BALA sought to find out: whether artists have received royalties under the act; the level of voluntary cooperation on the part of dealers; the effect on the relationship between artists and dealers; whether dealers feel the act has had an impact on the California art market; and whether artists perceive a need for third party enforcement.³⁹ A total of 81 questionnaires were sent to San Francisco Bay Area galleries and auction houses (referred to as "dealers"), and 208 to visual artists.⁴⁰

Out of the 36 individual artists responding, 30 thought the resale royalty was "basically a good idea." Of the 15 dealers responding, 11 agreed.

³⁷(...continued)

Nimmer writes that "the annotated California Code reveals only a trickle of cases under this section." 2 M. Nimmer, Nimmer on Copyright 8-376 n. 9. See Solomon and Gill supra note 8, at 335-36 (suggesting individual artists are reluctant to sue dealer, supportive collector, friend or relative for fear of jeopardizing a continuing relationship).

³⁸ Alma Robinson, BALA Surveys Artists and Galleries on Resale Royalties, 4 BALA-GRAM 1 (Nov.-Dec. 1986), reprinted in Visual Artists Rights Act of 1987: Hearings on S.1619 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. 119 (1987). BALA is now California Lawyers for the Arts.

³⁹ Id.

⁴⁰ Id. at 2. Less than 20 percent of those surveyed responded to the questionnaires. This included only 36 visual artists. Of the 21 who answered a question about what percentage of their income is derived from art sales, four said they derive 95 to 100 percent of their income from art, one indicated between 50 to 100 percent, six indicated 25 to 60 percent, and 10 indicated 10 percent or less. Id.

There was general agreement, however, that qualifying resales are rare. Only three of the artists responding had received royalties under the Act. Four art galleries reported handling 22 resale royalties since 1977. ⁴¹

One of the 15 responding art dealers thought the law should be repealed outright, while two thought it should be made applicable nationally. None said it had a significant effect on their sales, but two felt it had a significant effect on the California art market. ⁴²

One dealer raised privacy issues associated with the required record-keeping, ⁴³ while another thought there should be a "central" registration system. ⁴⁴ Artists mentioned problems with enforcement and obtaining information about sales and buyers as their main concerns, and five feared that enforcing their rights would be harmful to their careers. ⁴⁵ Four artists had dealt with galleries or individual owners who were reluctant to comply with the Act, and 11 reported galleries had refused to give them information about the sale of their work, "including buyer's names, addresses and resale prices." Twenty-two artists said they would allow a private agency to enforce their rights. ⁴⁶

⁴¹ Id.

⁴² Id.

⁴³ Id. (stating that "a lot of patrons don't want their names given out for security reasons, etc. Most people don't want their names spread around...").

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ Id. Only 13, however, would use such an agency if it took a "substantial percentage" of the royalties as a fee. Id.

The BALA study also mentioned the role of the State Arts Council in receiving funds from sellers unable to locate artists. The study stated that, in its most recent report, \$13,435 had been deposited in a trust account on behalf of 14 artists.⁴⁷

At January 1992 hearings on Artists' Resale Royalties in San Francisco, at least two artists testified to positive experiences and significant financial gain from the California statute. Richard Mayer, sculptor and Vice President of National Artists Equity Association, reported receiving resale royalties of \$25,520 in the last eight years.⁴⁸ He reported that his experience was not unique. Ruth Asawa, a sculptor whose work has been commissioned for public places, testified to having received \$5,000 when Ghiradelli Square, including her fountain structure, was sold, and \$7,000 when the San Francisco Hyatt, including her fountain, was sold.⁴⁹

b. Criticism of the California Law. The California law has been the subject of substantial criticism. The law is criticized as being underused and underenforced, and therefore ineffective.⁵⁰

⁴⁷ Id.

⁴⁸ San Francisco Hearing at 44 (statement of Richard Mayer), App. Part II.

⁴⁹ Id. at 53-54 (statement of Ruth Asawa).

⁵⁰ One commentator summed it up as follows:
Despite the (1982) amendments, the Act is perhaps the State's most neglected and underused law. Many of those who could benefit are ignorant of the Act; others who are aware of the Act feel impotent to enforce it. Those whom the Act seeks to regulate do not comply with its provisions. The monitoring necessary for individual enforcement is an impossible bureaucratic nightmare attempted by no one. Apparent lack of effective means to collectively enforce the Act has made it virtually irrelevant. As a result, visual artists continue to be exploited and remain uncompensated for their residual interests in resold artwork.

(continued...)

One commentator notes several difficulties associated with private enforcement by individual artists. First is the inability of artists adequately to track resales where there is no affirmative, enforced obligation to report or notify. Second is the expense of pursuit, including sometimes litigation. Third, is the fear of being blackballed.⁵¹

Many of these problems might be solved by establishment of an artists' collecting society, such as SPADEM in France. "There is little hard statistical data on the effectiveness of this legislation. . .What has not yet happened, however, because the application of the law is still limited only to California, is the creation of an ASCAP-like enforcement organization," testified Professor Thomas Goetzl, who supports establishment of such an entity.⁵²

Others have argued that the resale royalty creates a disincentive for investment in contemporary art, and benefits older, established artists.⁵³ These commentators say the statute reduces the original bid prices for art works because buyers adjust to the resale royalty, and artists are forced to accept a lower current price in exchange for a promise of a portion of the future resale

⁵⁰(...continued)
McInerney, California Resale Royalties Act, Private Sector Enforcement, 19 Univ. of San. Fran. L. Rev. 1, 3 (1984).

⁵¹ San Francisco Hearing at 15-16 (statement of Jack Davis, Esq.), App. Part II.

⁵² Id. at 4 (statement of Thomas Goetzl).

⁵³ See Ben W. Bolch, William Damon, and C. Elton Hinshaw, An Economic Analysis of the California Art Royalty Statute, 10 Conn. L. Rev. 689, 696, 699 (1978) (writing that only "established artists are likely to benefit from the statute... Thus, if the statute benefits anyone, it benefits the select few who need protection the least...The net result will be to penalize the unknown, struggling artist").

price.⁵⁴ They argue that there is a windfall gain to artists whose works were sold at full market value before the market anticipated the resale royalty.⁵⁵ These commentators see the law as "a misguided attempt at paternalism."⁵⁶

Many fault the law for giving the artist a percentage of the gross resale price rather than a percentage of any profit on the resale;⁵⁷ and for treating the difference between the purchase price and the resale price as "profit" with no recognition of commissions, expenses, or inflation.⁵⁸

Commentators have identified various loopholes in the California law. At one time, for example, the law did not apply to resales after the artist's death. One commentator suggested art owners could dispose of art through long term leases with purchase options exercised after the artist's death.⁵⁹ The

⁵⁴ Id. at 696, 699; Stephen S. Ashley, A Critical Comment on California's Droit de Suite, Civil Code Section 986, 29 Hastings L. J. 249, 252 (1977). Both Ashley and Bolch/Damon argue that this forces artists to be "investors" in their own work. Ashley at 252-53; Bolch/Damon, supra note 53, at 695-96.

⁵⁵ Bolch and Damon, supra note 53, at 696, 699; Ashley, supra note 54, at 251.

⁵⁶ Bolch and Damon, supra note 53, at 699.

⁵⁷ Merryman, supra note 10, at 233. But see supra, Ch. I, notes 39-41 and accompanying text (discussing method of measuring proceeds right in France by resale price as matter of expediency).

⁵⁸ Merryman, supra note 10, at 233. See also San Francisco Hearing at 26 (statement of Jack Davis) ("Once you begin to try and calculate what a profit is, you very quickly and not inappropriately get into questions of whether one includes indirect as well as direct costs," such as rent, lights and transportation). App. Part II.

⁵⁹ Ashley, supra note 54, at 257. By a 1982 amendment, however, the royalty requirement now applies until the 20th anniversary of the artist's death. CAL. CIV. CODE §986(a)(7)(West Supp.).

California law is also criticized for its purported application to sales outside of California.⁶⁰

Parts of the critique apply to droit de suite legislation in general.⁶¹ Because California is the sole jurisdiction in the United States with such legislation, however, the law is particularly criticized as placing the California art marketplace "at a competitive disadvantage in relation to the markets in other states," and potentially disrupting relationships among artists and dealers.⁶² As Representative Waxman observed, "Part of the failing of the California law is that it's only in California."⁶³

Critics assert that it is easy to escape the California law by setting up sham sells to a corporation outside California and then consummating the actual sale outside California.⁶⁴ Critics also charge that California's

⁶⁰ See supra note 21 and accompanying text (discussing opinion of California legislative counsel George Murphy that law is unconstitutional as applied to sales outside state) and infra note 93 and accompanying text (noting Morseburg court's discussion of potential problems raised by multiple application of resale royalty laws by states).

⁶¹ See Ashley, supra note 54, at 256 ("California's droit de suite legislation is subject to the criticism that can be leveled against all legislation of this kind").

⁶² Id. at 256. Ashley writes, "The legislature, by limiting section 986 to sales that take place in California or that are made by a California resident, has effectively mandated a choice of law provision that will have uniquely undesirable consequences." Id. at 259. But see San Francisco Hearing at 22 (statement of BALA's Alma Robinson) (no evidence that law has driven art market out of state).

⁶³ L.A. Times, Sept. 8, 1977, §4, at 1, col. 2, cited in Solomon and Gill, supra note 8, at 323 n. 5.

⁶⁴ Ashley, supra note 54, at 258. See also Solomon and Gill, supra note 8, at 352 ("The California experience demonstrates that a state statute which only regulates sales within that state and sales by residents of that state is easily circumvented").

art market has suffered.⁶⁵ This conclusion has been questioned by others.⁶⁶

Droit de suite legislation has been introduced in Connecticut, Florida, Illinois, Iowa, Maine, Michigan, Nebraska, New York, Ohio, Rhode Island, and Texas.⁶⁷ To date, none has become state law.⁶⁸ Comments on the proposed New York legislation may indicate some of the problems other states fear:

⁶⁵ See Merryman, supra note 10, at 233 (reporting that Sotheby, Inc., in Los Angeles, then the largest art auctioneer in the state, "immediately" suspended contemporary art sales partially in response to the new law). Sotheby's General Counsel Marjorie Stone confirms that the new law was "a factor" in the decision of the company, which maintains the policy in its large Los Angeles office of not dealing in contemporary art sales. Telephone interview with Marjorie Stone, General Counsel, Sotheby, Inc. and Sotheby Holdings, Inc. (July 14, 1992).

⁶⁶ See Visual Artists Rights Act of 1987: Hearings on S.1619 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. 109-10 (1987) (statement of Henry Hopkins, Director, Frederick R. Weisman Foundation of Art) ("My own personal opinion on that is that Sotheby's was not doing enough business in California to justify their being there, and they used that as a convenient excuse to leave").

⁶⁷ See, e.g., L.A. Times, Sept. 8, 1977, §4, at 13, col. 1, cited in Solomon and Gill, supra note 8, at 323 n. 4. Clack, Artist's Rights, The Cultural Post, March-April, 1977, at 10; Ohio House Bill 808, 112th General Assembly, Regular Sess., Sec. 3379.11(A), OHIO REV. CODE (1977). The Ohio bill, for example, introduced on July 6, 1977, provided that whenever a work of fine art is sold and the seller is an Ohio resident or the sale takes place in Ohio, the seller or his agent would be responsible for payment of five percent of the sales price to the artist. Id. The royalty would be due only if the resale were at a profit and the gross sales price were greater than five hundred dollars. Id.

⁶⁸ Like California, New York and Massachusetts have moral rights legislation that gives the artist the right to claim or, under some circumstances, disclaim authorship, and to prevent others from defacing the work or altering it so as to damage the artist's reputation. California Art Preservation Act, CAL. CIV. CODE §987 (West. Supp. 1992); New York Artists' Authorship Rights Act, N.Y. ARTS AND CULTURAL AFFAIRS LAW §§11.01, 14.03; Massachusetts Art Preservation Act, MASS. G.L. art. 231 §85S. Also, many states have laws relating to art consignment sales. These generally concern delivery of works of fine art for exhibition or sale, and state conditions and principles relating to the dealer's responsibility as artist's agent or trustee. See, e.g., ARK. STAT. ANN. §4-73-207 (1992); ARIZ. REV. STAT. §44-1773 (1991).

This bill is disapproved because...it has been presented without any investigation as to its potentially radical impact on the art market in the State of New York and the economic interests of the artists, dealers and collectors who may be affected by it. In addition, the bill as drafted presents a number of serious legal questions about its validity.⁶⁹

Because of the possible inability to enforce the law out-of-state, the potential problem of multiple applications of laws by different states, and the ultimate issue of federal preemption, some commentators argue that any solution to the resale proceeds dilemma must be within the framework of federal copyright law.⁷⁰

⁶⁹ 1977 Bulletin Comm. on State Legis. No. 6, at 711 (Ass'n of Bar of the City of N.Y.), cited in Solomon and Gill, supra note 8, at 2.

⁷⁰ See, e.g., 2 M. Nimmer, Nimmer on Copyright 8-383 (1991) ("Whether such a right should be enacted in the United States is something upon which reasonable persons may differ. It is submitted, however, that any such right, if enacted at all, must be on the federal level. A Balkanization of copyright protection that would follow from the preemption approach adopted by the court in Morseburg could ultimately unravel the unitary copyright system so carefully evolved over the years"); Weaver, Artists Resale Royalties Legislation: Ohio House Bill 808 and a Proposed Alternative, 9 Univ. of Toledo L. Rev. 366, 374 (1978); Damich, The New York Artists' Authorship Rights Act: A Comparative Critique, 84 Colum. L. Rev. 1733, 1756 (1984).

3. The Question of Federal Preemption

State resale royalty laws such as California's raise questions of federal preemption. The federal preemption doctrine concerns the relationship between the sovereign United States and the states as members of the Union. Its basis is in the federal system of government and in the supremacy clause of the U.S. Constitution, which provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.⁷¹

Under preemption analysis, courts consider whether a federal legislative scheme necessarily preempts a state scheme or whether the two statutory schemes can operate concurrently. Applying preemption analysis, courts will ask whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁷²

The question of federal preemption and the California law is not a settled one. The law rode out a constitutional challenge in Morseburg v. Balyon,⁷³ which held that California's law was not preempted under the 1909 Copyright Act. Cases and commentary since then, however, have suggested a different result under the 1976 Act.

In the intellectual property area, the Court's approach to preemption has varied. Section 301 of the 1976 Copyright Act was enacted in part to clarify the law.

⁷¹ U.S. Const. art VI, cl. 2.

⁷² Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

⁷³ 621 F.2d 972 (9th Cir. 1980), cert. denied, 449 U.S. 983 (1980).

A line of cases in the late 1950's and early '60's took a firm stand in favor of federal power in the intellectual property area.⁷⁴ In the early 1970's, however, two Supreme Court cases seemed to shift some power back to the states: Goldstein v. California;⁷⁵ and Kewanee Oil Co. v. Bicron Corp.⁷⁶ In Goldstein, the Court held that the 1909 Act did not preempt a California statute making it a criminal offense to "pirate" recordings. The Court limited Sears-Compco to the patent field, and said that the Constitutional Clause granting Congress power to issue copyrights does not vest such powers exclusively in the Federal Government nor "expressly provide that such power shall not be exercised by the States."⁷⁷

In 1976, the situation was clarified by section 301 of the 1976 Copyright Act, which provides:

On or after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and

⁷⁴ See Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964) (holding that state unfair competition law cannot enjoin copying of product whose patents are invalid for want of invention, because such use of state law conflicts with exclusive power of federal government to grant patents only to true inventions and only for limited time); Compco Corp. v. Day-Brite Lighting, 376 U.S. 234 (1964) (holding that injunction against copying unpatentable design is in conflict with federal patent laws); Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657, 667 (2d Cir. 1955) (holding that states cannot override constitutional purpose of granting only for 'limited Times' the untrammelled exploitation of author's 'Writings').

⁷⁵ 412 U.S. 546 (1973), reh. denied, 414 U.S. 883 (1973).

⁷⁶ 416 U.S. 470 (1974). See Note, The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court, 75 Colum. L. Rev. 623 (1975), cited in Morseburg, 621 F.2d at 976.

⁷⁷ 412 U.S. at 553.

103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.⁷⁸

Section 301(b) delineates the non-preemptive categories, including:

(1) noncopyrightable works, including works of authorship not fixed in any tangible medium of expression; and (2) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.⁷⁹

According to Professor Nimmer, the 1976 Copyright Act creates a federal preemption of state law when (1) the state law creates rights "equivalent" to rights granted in the Copyright Act, and (2) such rights under state law apply to "works of authorship" within the subject matter of the Copyright Act.⁸⁰ Applying this test, Nimmer finds California's resale royalty law to be preempted.⁸¹ First, works of fine art clearly are "works of authorship."⁸² Second, the California Act inhibits the distribution right under sec. 106 as modified by section 109(a). Sec. 109(a) codifies the first sale doctrine which allows copyright owner to control physical disposition of a lawfully made copy (including an original) only until the first authorized sale.⁸³ "[I]t may be said, "writes Nimmer," that the federal policy contained in the

⁷⁸ 17 U.S.C. §301(a).

⁷⁹ 17 U.S.C. §301(b) (emphasis added).

⁸⁰ 2 M. Nimmer, Nimmer on Copyright 8-380 (1991).

⁸¹ Id. at 8-381.

⁸² Id. at 8-380.

⁸³ Id. at 8-381.

'first sale' doctrine, which permits uninhibited resale of a work of art following its initial sale, may not be countered by a contrary state law, even though the state law's inhibition is by way of royalty rather than prohibition."⁸⁴

a. Morseburg v. Balyon. In Morseburg v. Balyon, an art dealer claimed that the California Act violated the Contracts Clause and was preempted by the 1909 Copyright Act, in effect when the art sales in question took place in 1977.⁸⁵ The U.S. District Court for the Central District of California rejected these contentions, and the Ninth Circuit affirmed.⁸⁶

The art dealer asserted that the 1909 Copyright Act preempted the California Act in two ways. First, he claimed the law impaired the artist's ability under section 1 of the 1909 Act to vend a work of fine art.⁸⁷ Second,

⁸⁴ Id. at 8-381. Accord, W. Patry, Latman's The Copyright Law 89 n. 47 (1986) (arguing that California law is preempted: "Since the first sale of a lawful copy is considered to exhaust the copyright owner's §106(3) distribution right with respect to that copy[...], the droit de suite in effect grants an additional distribution-type right to the author"). See also Katz, supra note 1. See also Robert H. Jacobs, Inc. v. Westoaks Realtors, Inc., infra notes 98-111 and accompanying text (implying in dictum that California law may be preempted under 1976 Act); Merryman, supra note 10, at 233 (writing that preemption under 1976 Act would have been one of "the most promising grounds for attack" in Morseburg). But see 2 M. Nimmer, Nimmer on Copyright 8-383 n. 52 (1991) (writing that "given the lack of enforcement under this section, no litigant appears even on the horizon with an incentive to mount a preemption argument under the 1976 Act").

⁸⁵ The 1976 Copyright Act became effective January 1, 1978, after the sale of the two paintings. The court addressed its holding to the 1909 Act only, and did not consider the extent to which the 1976 Act (particularly section 301) might have preempted the California law. 621 F.2d 972, 975 (1980). The district court had noted in dictum, however, that "it appears that the Resale Royalties Act is not preempted by the Revision Act of 1976." Morseburg v. Balyon, 201 U.S.P.Q. (BNA) 518 (C.D. Cal. Mar. 23, 1978)(LEXIS, Genfed library, Dist. file).

⁸⁶ 621 F.2d at 975.

⁸⁷ Id.
Section 1 of the 1909 Copyright Act provides in relevant part:
(continued...)

he contended that the law conflicted with section 27 of the 1909 Copyright Act in that it "restricts the transfer" of a work of fine art when in the hands of one who purchased or obtained it lawfully from the artist.⁸⁸

The court held the 1909 Act did not preempt California's law.⁸⁹ Citing Goldstein v. California,⁹⁰ the Ninth Circuit said the United States Supreme Court had previously held that Congress had evidenced no intent under the 1909 Act to bar the states from exercising their power with respect to authors' rights, and as a consequence, the area was not fully occupied by the federal government.⁹¹ In addition, the Ninth Circuit noted, the California law does not prevent the author from "vending" his work; instead, the law affords "an additional right similar to the additional protection afforded by California's anti-pirating statute upheld in Goldstein":

[This would be] sophistry were it true that the right "to vend" provided by section 1 of the 1909 Act meant a right to transfer the works at all times and at all places free and clear of all claims of others. It is manifest that such is not its meaning. It merely

⁸⁷(...continued)

Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right: (1) To print, reprint, publish, copy and vend the copyrighted work.

⁸⁸ 621 F.2d at 975.

Section 27 of the 1909 Act provides in relevant part:

[N]othing in this title shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained.

⁸⁹ 621 F.2d at 977.

⁹⁰ 412 U.S. 546 (1973), reh. denied 414 U.S. 883 (1973). See supra notes 75-77 (discussing Goldstein).

⁹¹ 621 F.2d at 978. "The crucial inquiry is not whether state law reaches matters also subject to federal regulation, but whether the two laws function harmoniously rather than discordantly." Id.

means that the artist has "the exclusive right to transfer that title for a consideration to others." See Bauer v. O'Donnell, 229 U.S. 1, 11 (1912). The California Act does not impair this right; it merely creates a right in personam against a seller of a "work of fine art."⁹²

The court saw how "resale royalty acts under certain circumstances could make transfer of the work of fine art a practical impossibility" if more than one state imposed a resale royalty law upon a single sale.⁹³ However, the court restricted its holding to its facts, saying, "Without regard to how the

⁹² 621 F.2d at 977. But see W. Patry, Latman's The Copyright Law 89 (1986) (arguing that "the statute adjudicated in Goldstein, however, concerned subject matter not protected (at that time) by the Copyright Act [phonorecordings], whereas the California droit de suite concerns both subject matter admittedly protected by copyright and an equivalent right concerning the disposition of that subject matter, a combination that mandates preemption."). Accord 2 M. Nimmer, Nimmer on Copyright 8-382 (1991) ("The [Morseburg] court thus equated for preemption purposes a state law (such as that in Goldstein) which extended protection to a category of work unprotected under the Copyright Act, and a state law which (contrary to the teachings of Sears and Compco, and contrary to the House Committee's definition of "equivalent" rights) enlarges rights with respect to a category of work which does fall within the subject matter covered by the Copyright Act. If the logic of this decision is followed it would mean that legislatures could as a matter of state law tinker with the Copyright Act in a variety of damaging ways.")

⁹³ 621 F.2d at 978 (emphasis added).

The court noted:

The California Act imposes its obligation when "a work of fine art is sold and the seller resides in California or the sale takes place in California." Cal. Civil Code §986(a). A similar statute enacted by another state could lead to a particular sale being construed as having been made in each state. Similar multiple application could occur if the statute of a state other than California imposed its obligation to protect resident artists whose works were sold within that state. A seller, who was a resident of California and who sold the work within the second state, would be confronted with the application of statutes of two states. Even if the second state adopted a statute identical to that of California, a sale by a California resident in the second state would result in multiple application.

Id. at 978 n. 3.

preemption argument should fare under those circumstances, we are not confronted with them here." ⁹⁴

The Morseburg court also found that the California law did not violate the Contracts Clause or the due process provisions of the U.S. Constitution. Not all impairments of contracts are improper, and the California law was not "severe, permanent, irrevocable and retroactive and [serving] no broad, generalized economic or social purpose" so as to violate the Contracts Clause. ⁹⁵ The law was an economic regulation with a rational basis, and therefore did not violate due process. ⁹⁶

b. Other Cases. Since Morseburg, courts and commentary have chipped away at the foundation under the California law. ⁹⁷

The California Court of Appeals has also suggested that the law may be preempted by the 1976 Copyright Act. In Robert H. Jacobs, Inc. v. Westoaks Realtors, Inc., ⁹⁸ the court denied recovery under the resale royalty law for an architect's plans, since the plans were not "fine art." ⁹⁹ The court cited Nimmer for the argument that the resale royalty was preempted by the 1976 Copyright Act, ¹⁰⁰ and quoted favorably from an article criticizing the droit

⁹⁴ Id. at 978.

⁹⁵ Id. at 979. "The obligation of the appellant created by the California Act serves a public purpose and is not severe." Id.

⁹⁶ Id. at 979-80.

⁹⁷ See notes 80-84 and 92 and accompanying text (discussing views of Nimmer and Patry).

⁹⁸ 159 Cal. App. 3d 637 (1984).

⁹⁹ Id. at 644.

¹⁰⁰ Id.

de suite for its romantic view of the artist.¹⁰¹ The court also refused to extend the scope of the droit de suite. Although the law requires a royalty on resales of "...an original painting, sculpture, or drawing, or an original work of art in glass," the court said, "In the absence of legislative expression to include architectural plans prepared in a commercial setting, we cannot find recovery for Jacobs here."¹⁰²

Finally, a Pennsylvania case, Associated Film Distributed Corp. v. Thornburgh,¹⁰³ reinforced the impression that any state codification of droit de suite would be preempted by the federal copyright scheme. In Thornburgh, the U.S. District Court for the Eastern District of Pennsylvania held that a state law regulating motion picture licensing was preempted under the 1976 Act,¹⁰⁴ and implied that Morseburg might have been decided differently under the 1976 Act, as well.

The Thornburgh court observed that Morseburg "rejected the argument that a state transfer tax on royalties should be preempted under the former Copyright Act,"¹⁰⁵ but had said that "when the 'area of occupation' is peculiarly federal, or nationwide in its concern, the Supreme Court has

¹⁰¹ Id. (quoting Price, Government Policy and Economic Security for Artists: The Case of the Droit de Suite, 77 Yale L. J. 1333, 1335 (1968)).

¹⁰² Id.

¹⁰³ 520 F. Supp. 971 (E.D. Pa. 1981).

¹⁰⁴ Where most state laws simply prevented film licensing without advance screening, the Pennsylvania statute also prohibited guarantees of minimum film rental when a license agreement provided for payment to the distributor based on a percentage of attendance or box office receipts, and prohibited advances of film rentals by exhibitors to distributors. Id. at 973, 975-76.

¹⁰⁵ 520 F. Supp. at 992 n. 36 (emphasis added).

emphasized the national interest and has found preemption."¹⁰⁶ The Thornburgh court said:

[The] history, purposes and provisions of the 1976 Copyright Act demonstrate that, in this area, Congress has 'unmistakably ordained' that federal enactments are to govern. [Citations omitted.] To make these intentions enforceable, Congress enacted an explicit statutory preemption section in the 1976 Copyright Act, Section 301 (a), 17 U.S.C. §301(a).¹⁰⁷

Thornburgh held that, in its broad regulation of the copyright licensing process under which motion pictures are made available to theatre audiences, the Pennsylvania Act indisputably affects rights granted under the federal Copyright Act.¹⁰⁸ While the Pennsylvania law did not prohibit grant of a copyright under federal law or establish a competing copyright system or equivalent right under state law, "which would obviously be preempted under Section 301,"¹⁰⁹ it did substantially restrict the conditions under which a copyright holder may distribute and license its work.¹¹⁰

¹⁰⁶ Id.

¹⁰⁷ Id. at 992.

¹⁰⁸ Id. at 979. Therefore the law had to serve a "compelling" or "significant" purpose. Id. Assuming arguendo "that the purpose of correcting abuses due to 'economic disparity' were sufficiently compelling to justify... some limitation on a right granted by Federal copyright legislation," the Pennsylvania law was overbroad in that it absolutely eliminated certain provisions from license agreements, "regardless of the existence of any abuses or the existence of economic disparity between the parties or whether the practices were coerced or mutually sought." Id. at 979 (emphasis added).

¹⁰⁹ Id. at 993-94.

¹¹⁰ Id. at 994. Its regulation of conditions under which rental, lease and lending could take place interfered with the federally created rights granted by section 106 and with the copyright holder's "control over the sale or the commercial use..." of its work. Id. (citing Goldstein v. California, 412 U.S. 546 (1973), reh. denied 414 U.S. 883 (1973)). But see Warner Bros., Inc. v. Wilkinson, 533 F.Supp. 105 (1981). In that case, a motion picture production company brought suit seeking determination that a provision of the Utah Motion

(continued...)

The Thornburgh court's analysis together with the view of copyright experts firmly suggest that any state droit de suite provision would be preempted under the current Copyright Law. Given the potential problems of preemption, enforcement, and multiple application, any resale royalty law in the United States that is enacted should be at the federal level. ¹¹¹

C. FEDERAL PROPOSALS

Although the first droit de suite legislation in the United States sprang from a state legislature, there have been serious attempts to establish federal legislation. Some of these proposals would make the droit de suite a part of United States copyright law.

Since the mid-70's, several bills have been introduced in Congress regarding resale royalties and other moral rights for visual artists. While other legislation regarding moral rights has become federal law, ¹¹² federal proposals on droit de suite have failed to garner consensus.

¹¹⁰(...continued)

Picture Fair Bidding Act was unconstitutional and sought an injunction to prevent its enforcement. The District Court held constitutional a provision that if a motion picture exhibitor must pay the distributor a percentage of theater box office receipts, the distributor may not require a guarantee of a minimum payment or require the exhibitor to charge a minimum ticket price. The U.S. District Court for the Central District of D. Utah granted summary judgment for Warner Brothers.

¹¹¹ See, e.g., Solomon and Gill, supra note 8, at 352 ("Therefore, the effectiveness of art proceeds legislation in the United States depends upon federal legislation which applies to art transactions in interstate commerce").

¹¹² See infra notes 146-50 and accompanying text (discussing Visual Artists Rights Act of 1990) and notes 135-42 and accompanying text (discussing moral rights of paternity and integrity).

1. The Waxman Bill

In 1977, Rep. Henry Waxman prepared a resale royalty bill for introduction into the U.S. Congress.¹¹³ After informally gauging the reaction to his draft among interested persons and arts-related groups,¹¹⁴ Waxman introduced the Visual Artists' Residual Rights Act on March 8, 1978.¹¹⁵

The Waxman bill provided for a five percent resale royalty on the gross sales price to be paid by the seller of a work of visual art sold in interstate or foreign commerce for \$1,000 or more.¹¹⁶ It established a National Commission of the Visual Arts to oversee the droit de suite system, and a Visual Arts Fund in the Department of the Treasury. The right to enforce or collect the royalty lay in the Commission.

The bill required that the work to be registered with the Commission prior to the resale. The purpose of registration was authentication of the work.¹¹⁷ The seller was required to file with the Commission a statement describing the work sold and the amount of payment. As on the state level, the bill established civil penalties for failure to comply with the Act.¹¹⁸

Waxman's bill did not apply to: sale or resale of a work by the artist; resales occurring after the artist's life plus 50 years; resales for less

¹¹³ See Merryman, supra note 10, at 221.

¹¹⁴ . Id.

¹¹⁵ H.R. 11403, 95th Cong., 2d Sess. (1978).

¹¹⁶ Id. at §4(a)(1).

¹¹⁷ Solomon and Gill, supra note 8, at 349.

¹¹⁸ H.R. 11403 at §4(d)(2). See Solomon and Gill, supra note 8, at 348 ("The proposed Act not only appears to eliminate the enforcement problems inherent in the California statute but also seems to come closer to striking the necessary balance between the economic needs of the parties").

than the purchase price plus an amount equal to five percent of such sales price; resales between dealers within two years of the initial sale; and to resales in connection with sale of a building.¹¹⁹ Representative Waxman did not strenuously support the revised bill, and it died in Committee.¹²⁰

2. The Kennedy-Markey Proposals

It was nearly another ten years before droit de suite legislation was reintroduced to the United States Congress. On September 9, 1986, Senator Edward Kennedy introduced the Visual Artists Rights Amendment of 1986.¹²¹ The bill established for artists the limited moral rights of paternity and integrity,¹²² and provided that, whenever a pictorial, graphic, and sculptural work was sold, the seller would pay to the artist a royalty of seven percent of the difference between the purchase price and the sale price.

The royalty requirement did not apply to resale of a work for less than \$500, nor for less than 140 percent of the price paid by the seller.¹²³ The artist could not waive the right to collect the royalty under Senator Kennedy's bill, but could assign the right. If the artist was deceased at the time of the sale, and the sale occurred within fifty years after the death of the artist, the royalty was to be paid to the National Endowment for the Arts for use in the visual arts program.¹²⁴

¹¹⁹ H.R. 11403, supra note 115, at §4(e)(1).

¹²⁰ Merryman, supra note 10, at 221.

¹²¹ S. 2796, 99th Cong., 2d Sess. (1986).

¹²² See infra notes 135-42 and accompanying text (discussing rights of paternity and integrity).

¹²³ S. 2796, supra note 121.

¹²⁴ Id.

The Copyright Office would have played a significant role under Senator Kennedy's proposal. Any artist seeking royalties for resale of a work had to register with the Copyright Office. All sales or transfers of pictorial, graphic or sculptural works by registered artists were to be registered by the seller or transferor with the Copyright Office. Failure of a seller or transferor to register transfer or sale of a work by a registered artist would have constituted copyright infringement.¹²⁵

At 1986 hearings held at Cooper Union, New York, Senator Kennedy said the legislation's purpose was to recognize the "intrinsic value of our national cultural heritage and the need to sustain an environment in America which encourages cultural diversity and artistic excellence."¹²⁶ An identical bill was introduced in the House of Representatives by Representative Markey on October 16, 1986.¹²⁷

A year later, on August 6, 1987, Senator Kennedy introduced a similar piece of legislation, S.1619, entitled the "Visual Artists Rights Act of 1987."¹²⁸

A companion identical bill, H.R. 3221, was introduced by Representative Markey on August 7, 1987.

Under the 1987 Kennedy-Markey proposal, the seven percent royalty would have applied to all pictorial, graphic, and sculptural works that resold for \$1000 or more. The royalty would not apply to resale of a work for less than

¹²⁵ Id.

¹²⁶ Visual Artists Rights Amendment of 1986: Hearings on S. 2796 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary, 99th Cong., 2d Sess. 1 (1986).

¹²⁷ H.R. 5722, 99th Cong., 2d Sess. (1986).

¹²⁸ S. 1619, 100th Cong., 1st Sess. (1987).

150 percent of the purchase price paid by the purchaser.¹²⁹ If the artist were deceased at the time of the sale, and the sale occurred within fifty years after the author's death, the royalty would be paid to the author's estate.¹³⁰

The 1987 Kennedy-Markey plan called for some careful record-keeping. In order to qualify for a resale royalty, the artist had to register on a one-time basis with the Copyright Office prior to resale.¹³¹ To avoid copyright infringement, the seller or other transferor had to register with the Office sales or transfers "by registered authors for which a royalty is due..." within 90 days. An infringing seller was subject to a penalty of triple the amount of the royalty owed.¹³²

At Senate hearings on S. 1619, Senator Kennedy said the legislative intent was to alleviate "the serious problem of economic exploitation of visual artists by permitting them to share in the appreciating commercial value of their work."¹³³ Rep. Markey, who sponsored the legislation in the House, stated:

[Visual artists...need the right to participate economically in the success of the work...A work of art is not a utilitarian object like a toaster. It is an intellectual work like a song, a novel or a poem. We should not pretend that all connection between the artist and his work is severed the first time the work is sold.¹³⁴

¹²⁹ Id. at §(d)(1) and (2).

¹³⁰ Id. at §3(d)(1).

¹³¹ Id. at §3(d)(2)(c) (emphasis added); see also The Visual Artists Rights Act of 1987: Hearings on S.1619 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. 4 (1987) [hereinafter 1987 Hearings on S.1619] (statement of Sen. Kennedy).

¹³² S. 1619, supra note 128, at §3(f) and (g) (emphasis added).

¹³³ 1987 Hearings on S.1619, supra note 131, at 2 (statement of Sen. Kennedy).

¹³⁴ Id. at 15 (statement of Rep. Markey).

a. The Rights of Paternity and Integrity. Within the framework of federal copyright law, the Kennedy-Markey legislative proposal, S. 1619 and H.R. 3221, would have granted the author a limited right of paternity and integrity, and a limited right against destruction, as well as a resale royalty right or droit de suite. Senator Kennedy acknowledged that "resale royalties are the most controversial provisions in this legislation."¹³⁵ The proposed Visual Artists Rights Act of 1987 would have granted the author of a work of "recognized stature" a limited right of paternity, i.e., the right during his life to claim authorship of any of his works which were publicly displayed, or to disclaim authorship of any of his publicly displayed works due to distortion, mutilation, or other alteration.¹³⁶ The bill provided:

In determining whether a work is of recognized stature, a court of other trier of fact may take into account the opinions of artists, art dealers, collectors of fine art, curators of art museums, restorers and conservators of fine art, and other persons involved with creation, appreciation, history, or marketing of fine art.¹³⁷

Testifying on this aspect of the Kennedy bill, Register of Copyrights Ralph Oman observed that, "Traditionally, the U.S. copyright law has not given additional rights to a work based on its perceived quality... The copyright law

¹³⁵ Id. at 2 (statement of Sen. Kennedy) ("It is fair to say that resale royalties are the most controversial provisions in this legislation, but it is not a novel concept. It has long been applied for the benefit of other creative artists, and the visual artists deserve such protection too"); id. at 15 (statement of Rep. Markey) ("The resale royalty is perhaps the most contentious provision of the bill because it involves money. Let's be frank. There is a lot of money being made in the art world. The problem is that too little of it ever gets to the artist.")

¹³⁶ S. 1619, supra note 128, at §3.

¹³⁷ Id. at §2(3).

has traditionally relied on the marketplace to control the rewards earned by the artists." ¹³⁸

The right of integrity under the Act would have applied to all publicly displayed pictorial, graphic, or sculptural works. This right protects such works against "the significant or substantial distortion, mutilation, or other alteration... caused by an intentional act or by gross negligence..." ¹³⁹ Finally, the Kennedy-Markey proposal would have conferred upon artists of works of "recognized quality" a right against destruction by an intentional act or gross negligence. ¹⁴⁰

These rights did not cover works that could not "be removed from a building without distortion, mutilation, or other alteration... unless expressly reserved by an instrument in writing signed by the owner of such building and the author of the work of fine art and properly recorded in the applicable State real property registry for such building, prior to the installation of such work..." ¹⁴¹

Where a work of fine art constituted part of a building and could be removed "without substantial harm," the moral rights would have applied unless the building owner attempted to notify author according to requirements in the bill. ¹⁴²

¹³⁸ 1987 Hearings on S.1619, supra note 131, at 17.

¹³⁹ S. 1619, supra note 128, at §3(c)(1).

¹⁴⁰ Id. at §3(c)(2).

¹⁴¹ Id. at §4(d)(1).

¹⁴² Id. at §4(d)(2). For further discussion of the rights of paternity and integrity, see Martin A. Roeder, The Doctrine of Moral Rights: A Study in the Law of Artists, Authors and Creators, 53 Harv. L. Rev. 554 (1940); James M. Treece, American Law Analogues of the Author's 'Moral Right', 16 Am. J. Comp. L. 487 (1968); Comment, Toward Artistic Integrity: Implementing Moral Right Through Extension of Existing American Legal Doctrines, 60 Geo. L. J. 1539 (1972), cited in Solomon and Gill, supra note 8, at 324.

b. Hearings on the Kennedy-Markey Proposal. The Senate Judiciary Subcommittee on Patents, Copyrights and Trademarks held hearings on S. 1619 on December 3, 1987. The Register of Copyrights reservedly endorsed the bill, withholding full support until hearing from "the experts."¹⁴³ However, the arguments from the experts proved inconclusive. The proponents advocated equity and fairness for the artist, citing the on-going economic interest an artist has in his or her work.¹⁴⁴ The opponents, on the other hand, used economic principles to discredit the legislation as "counter-productive." For example, Frederick Woolworth, gallery owner and president of Art Dealer's Association of America, Inc., saw S.1619 as a "forced profit sharing" and a sui generis tax "designed to make the rich richer at the expense of the poor [artists]." Woolworth argued:

While it will provide additional income to the very small group of already highly successful artists who have a secondary market, it is ultimately harmful to the interests of most artists. It is also unfair... and a disincentive to collectors of art by living artists who are willing to support those artists by taking the risks involved in buying their works.¹⁴⁵

¹⁴³ 1987 Hearings on S.1619, supra note 131, at 18, 20 (statement of Ralph Oman) ("We have no principled objection to the concept of resale royalty rights. We do, however, have some questions...I think we have to be very careful in reordering relationships in the art world").

¹⁴⁴ See, e.g., id. at 109 (statement of Henry T. Hopkins, Director, Frederick R. Weissman Foundation of Art, Los Angeles, California); id. at 297 (statement of Schuyler Chapin and Alberta Arthurs, Chairman and President of the Independent Committee on Arts Policy); id. at 64 (statement of Robert Mangold, Artists, Washingtonville, New York).

¹⁴⁵ Id. at 281 (statement of Frederick Woolworth).

3. The Visual Artists Rights Act of 1990

If the droit de suite provisions in the Visual Artists Rights Act of 1987 invited controversy, then the Visual Artists Rights Act of 1990 ducked it by the notable omission of such provisions. The Visual Artists Rights Act of 1990, which passed, was introduced by Representative Kastenmeier and did not include provisions on the issue of resale royalties for artists. ¹⁴⁶

The bills introduced by Kennedy and Markey in the 100th Congress had of course included a royalty provision, but that issue was put aside as part of a compromise designed to pass the legislation. ¹⁴⁷ According to Representative Carlos Moorhead, this omission represented a significant improvement over earlier versions of the legislation, in that the resale royalty issue had "clouded consideration of the moral rights aspect of the legislation." ¹⁴⁸ Instead, the new bill directed the Copyright Office to conduct two studies: the first on the extent to which the provision that allows an author to waive the moral rights by written agreement has been exercised, and the second on resale royalty rights and alternative solutions. ¹⁴⁹

¹⁴⁶ Visual Artists Rights Act of 1989: Hearings on H.R. 2690 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary, 101st Cong., 1st Sess. 17 (1989) [hereinafter 1989 Hearings]. In the Senate, Sen. Kennedy introduced a parallel bill, S.1198, on June 16, 1989. 135 Cong. Rec. S6811-S6813 (daily ed. June 16, 1989) (statement of Sen. Kennedy). Note that Congress stated explicitly that the Visual Artists Rights Act of 1990 as it amends the 1976 Copyright Act, does not preempt state resale royalty enactments. H.R. Rep. No. 101-514, 101st Cong., 2d Sess. 21 (1990).

¹⁴⁷ Id. at 17-18. See also 1987 Hearings on S.1619, *supra* note 131, at 18-19 (statement of Register of Copyrights Ralph Oman) (suggesting the sponsors "sever the moral rights provision from the rest of the bill and rely instead on the Berne implementing legislation").

¹⁴⁸ H.R. Rep. No. 101-514, 101st Cong., 2d Sess. 17 (1990).

¹⁴⁹ Id. at 28.

Part of the reason for sidestepping the controversial resale royalty issue was Congress' desire to address effectively the issue of moral rights for visual artists after United States adherence to the Berne Convention.

On March 1, 1989, the United States joined the Berne Convention for the Protection of Literary and Artistic Works. As a result, beginning March 1, 1989, copyright in the works of U.S. authors is protected automatically in all member nations of the Berne Union, and works of foreign authors who are nationals of a Berne Union country and works first published in a Berne Union country are automatically protected in the United States.

United States adherence to the Berne Convention did not specifically incorporate artists' moral rights, so the Visual Artists Rights Act was designed to establish moral rights for visual artists.¹⁵⁰ The Berne Convention also contains provisions on droit de suite.¹⁵¹

¹⁵⁰ 1989 Hearings, supra note 146, at 66. See also H.R. Rep. No. 101-514, 101st Cong., 2d Sess. 10 (1990) (statement of Register of Copyrights Ralph Oman) ("H.R. 2690 brings U.S. law into greater harmony with laws of other Berne countries...Enactment of moral rights legislation serves another important Berne objective-- that of harmonizing national copyright laws."). In the hearings on S. 1619, Sen. Kennedy commented, "I agree with Senator Leahy that moral rights legislation is not necessary to bring the United States into compliance with the Berne Convention." 1987 Hearings on S.1619, supra note 131, at 3 (statement of Sen. Kennedy).

¹⁵¹ See Ch. I, notes 207-15 and accompanying text (discussing art. 14bis of Berne Convention). See also 2 M. Nimmer, Nimmer on Copyright 8-374 ("The Berne Convention," to which the United States has adhered since March 1, 1989...recognizes an 'inalienable right to an interest' in the resale of an original work of art and original manuscript "). Nimmer writes that, given the failure of U.S. federal and state laws other than California's to provide such provisions, this country arguably is failing to honor its Berne commitments under article 14ter(1). Id. "On the other hand," he writes, "notwithstanding the 'inalienable right' conveyed by Article 14ter(1), the very next paragraph provides that the droit de suite is recognized 'only if legislation in the country to which the author belongs so permits...'" Id. at 8-374 n. 4 (citing Berne Convention (Paris text), art. 14ter(2)). "The question remains whether a country may permit no recognition of the droit de suite and still comply with Berne." Id. at 8-374 n. 4.

III. ANALYSIS OF WRITTEN COMMENTS AND COPYRIGHT OFFICE HEARINGS

A. ADMINISTRATIVE RECORD

On December 1, 1990, President Bush signed into law the Visual Artists Rights Act of 1990, which was generally effective on June 1, 1991, and grants to visual artists certain moral rights of attribution and integrity.¹ Section 608(b) of the legislation requires the Register of Copyrights, in consultation with the Chair of the National Endowment for the Arts, to study the feasibility of implementing a resale royalty on the sale of works of visual art.² This royalty would allow authors to share monetarily in the enhanced value of their works.

¹ Pub. L. No. 101-650, 104 Stat. 5089, 5128 (1990) [hereinafter VARA].

² The legislation mandates that:

[1] [NATURE OF STUDY]--The Register of Copyrights, in consultation with the Chair of the National Endowment for the Arts, shall conduct a study on the feasibility of implementing-

(a) a requirement that, after the first sale of a work of art, a royalty on any resale of the work, consisting of a percentage of the price, be paid to the author of the work; and

(b) other possible requirements that would achieve the objective of allowing an author of a work of art to share monetarily in the enhanced value of that work.

Id., 608(b). The legislative history states that Congress "should await the results of the Copyright Office study before deciding whether such provision is appropriate." H.R. Rep. No. 101-514, 101st Cong., 2d Sess. 23 (1990).

To assist in the preparation of this study, the Copyright Office issued a Notice of Inquiry requesting public information, particularly from "groups or individuals involved in the creation, exhibition, dissemination, and preservation of works of art, including artists, art dealers, auction houses, investment advisors, collectors of fine art, and curators of art museums." ³ Eighteen individuals or representatives of organizations responded to the Office's Notice of Inquiry. ⁴

The Office also held two public hearings to gather more information on the viability of resale royalties for visual artists -- one in San Francisco, on January 23, 1992, and another in New York, on March 6, 1992. Most of the commentators and the witnesses at the two hearings focused principally on the seven issues addressed in the Office's Notice of Inquiry:

1. Would resale royalty legislation promote or discourage the creation of new works of art, and, if so, how? How would the legislation affect the marketplace for works of art subject to such a requirement?
2. If resale royalty legislation is appropriate, what form should it take? For example, what categories of works of art should it cover? Should there be a threshold value for works to be subject to the requirement, and, if so, what should that amount be? Should there be a threshold requirement for an increase in value for the requirement, and, if so, what should the increased amount be? What should the amount of the resale royalty be and how should it be measured; by a percentage of the resaler's [sic] profit, the net sales differential, or some other measurement? Should the net sale [sic] differential be adjusted for inflation?

³ 56 Fed. Reg. 4110 (1991).

⁴ Initial comments were due on June 1, 1991; and reply comments by August 1, 1991.

3. Who should benefit from the requirement? For example, should it be limited to works created in the United States, or should it also include works of foreign origin sold in the United States? What are the international implications of such decisions? How is the issue handled in foreign countries and in California?
4. What should the term of any resale requirement be? Should it be coextensive with the copyright in the work? Should the right be descendible? Should or can the right be applied retroactively to works in existence at the date of enactment of any legislation?
5. Should there be any enforcement mechanisms, central collecting societies, or registration requirements? What are the experiences in foreign countries and in California with these problems? Who should record the initial and subsequent sales price? How will the system work if a work of art is presented as a gift, donated, or exchanged in a barter transaction?
6. Should the right be waivable or alienable?
7. Should the California law be preempted in the event of a federal law?⁶

⁶

Id.

B. SUMMARY AND ANALYSIS OF ADMINISTRATIVE RECORD

In addition to the eighteen comment letters,⁶ ten witnesses testified at the San Francisco hearing,⁷ and seventeen at the New York hearing.⁸ Most of the commentators supported a resale royalty right; artists, their rights associations, legal experts, and other advocates forcefully maintained that visual artists should be treated no differently from other creators who do receive royalties. A vocal minority, however, including some artists, representatives of museums, art galleries, auction houses, and legal experts argued against a resale royalty, calling it a tax that would have a deleterious effect on an already weak art market.

1. The Relationship of a Resale Royalty to Creation of New Works and its Effect on the Art Market

Public comment was split on whether resale royalties provide an incentive for the creation of new works. Some argued that increased revenue would certainly encourage an artist's productivity⁹ -- particularly because of

⁶ These comments are reprinted in Part I of the Appendix to this Report. All references to specific comments are cited to App. Part I. Page numbers given relate to pagination within Part I, not to pagination in the individual comment letters.

⁷ The official transcript of the San Francisco Hearing is reprinted in Part II of the Appendix to this Report. All references to this Hearing are cited to App. Part II.

⁸ The official transcript of the New York Hearing is reprinted in Part III of the Appendix to this Report. All references to this Hearing are cited to App. Part III.

⁹ Comment 2, at 2 (Yanich Lapuh, Painter); Comment 7, at 29 (National Artists Equity Association); Comment 8, at 33 (Artists Rights Society, Inc. [hereafter (ARS)]); Comment 13, at 86 (American Society of Magazine Photographers [hereinafter (ASMP)]); Comment 17, at 197 (Submitted by Mr. Gerhard Pfennig, Managing Director of Bild-Kunst [hereinafter Bild-Kunst]), App. Part I.

the increasing costs of producing art continuously.¹⁰ Alma Robinson, the Executive Director of California Lawyers for the Arts, testified that for younger and beginning artists "the possibility of a resale royalty provides an important incentive to continue their work."¹¹ Others maintained that resale royalties would have no effect on creativity,¹² since artists create for other than financial reasons.¹³ Some commentators expressed the view that resale royalties are too remote and uncertain to provide an incentive to create.¹⁴ This was countered by those who asserted that the promise of a participation in future value could not reasonably be seen as a disincentive to creativity.¹⁵

Supporters of a resale royalty right urged that the difference in payment for unique works causes artists to suffer.¹⁶ Several commentators

¹⁰ San Francisco Hearing at 48 (statement of Eleanor Dickinson, Vice President of Artists Equity; Vice President of California Lawyers for the Arts), App. Part II. See New York Hearing at 161-62 (statement of Sanford Hirsch) (artists bear cost of development and many of dealer's overhead costs for crating, transportation, framing and advertising, yet dealer and artist split proceeds in half on sale), App. Part III.

¹¹ San Francisco Hearing at 21, App. Part II.

¹² Comment 15, at 120-21 (Professor Goetzl), App. Part I.

¹³ Comment 9, at 39 (The New York Patent, Trademark and Copyright Law Association, Inc.), App. Part I; Comment 16, at 189 (Société des Auteurs dan les Arts Graphiques et Plastiques [hereinafter ADAGP]) submitted by Jean-Marc Gutton, Managing Director), App. Part I. See also New York Hearing at 32 (statement of Jean-Marc Gutton), App. Part III.

¹⁴ New York Hearing at 199 (statement of John Koegel, Chairman, Art Law Section of New York Bar), App. Part III.

¹⁵ See Comment 14, at 120-21 (Volunteer Lawyers for the Arts [hereafter VLA]), App. Part I. See also New York Hearing at 167-68, (statement of Sanford Hirsch) (resale royalty not disincentive even if only benefits established artists), App. Part III; See Comment 7, at 28-9 (National Artists Equity Association), App. Part I.

¹⁶ Letter from Shira Perlmutter, Assistant Professor Columbus School of Law, Catholic University, to Ralph Oman, Register of Copyrights (November 10, (continued...))

provided some statistical information as proof of the economic plight of artists vis-a-vis all other workers; however, they offered little or no information comparing the respective remuneration of visual artists and other creators. Consequently, the record does not contain sufficient empirical evidence to make a determination about differences in payment for creative works.

Although our examination of neither the administrative record nor the other pertinent material revealed sufficient data for us to conclude definitively that participation in a resale right encourages creativity, there was a great deal of testimony from artists that they should be able to participate in any appreciation of a work's value.¹⁷ Some artists oppose a resale royalty primarily because they feel it favors already successful artists and imposes administrative burdens.¹⁸ Most artists who testified in support of a resale royalty did so from the perspective that such a right was merely economic justice. One artist reasoned that since artists are forced to sell the work initially for "a pittance in order to survive and to continue to create their work. The increased value of the art they sold for literally pennies is due, in

¹⁶(...continued)

1992). Professor Perlmutter notes that "Financial success...depends on the price a single member of the public is willing to pay to possess the sole physical embodiment of the work of art, rather than the number of people willing to pay a fixed price to possess one of multiple copies." *Id.* at page 2.

¹⁷ All artists who testified were in favor of such a right; however, several organizations presented responses from artists who opposed such a right. See, e.g. New York Hearing at 235-38 (statement of Gilbert Edelson, Administrative Vice President of Art Dealer's Association of America), App. Part III. But see Comment 7, at 28 (National Artists Equity Association)(only a handful of artists organized by art dealers do not support a resale royalty), App. Part I.

¹⁸ Survey conducted by Visual Artists and Galleries Association, Inc., [hereinafter VAGA] prior to the New York Hearing.

large part, from the artist's continued persistence to produce work under adverse conditions." ¹⁹

There was similar disagreement among the commentators on the effect of implementing a resale royalty on the art market. On one side, advocates urged that resale royalties would have little or no effect, since they are comparable to other costs of art transactions, ²⁰ and opponents of the right are not complaining about the effect of the sales tax or dealer commissions. ²¹ They also noted that existing markets affording royalties have been successful. ²² Some commentators declared that the remote potential for a future royalty is too tenuous to affect the original sales price. ²³

On the other side, opponents warned that resale royalties would decimate an already depressed art market. Commentators with this point of view asserted that: most contemporary artists lack a broad initial market for their

¹⁹ Response of artist Richard Anuszkiewicz to survey. See also San Francisco Hearing at 67 (statement of Professor Goetzl)(suggesting that royalties like wage and child welfare laws may not be competitive, but Congress would be doing the right thing), App. Part II.

²⁰ The royalty would have less impact on a potential buyer than a sales tax. See Comment 2, at 1 (Yanick Lapuh), App. Part I. Comment 7, at 30 (National Artists Equity Association), App. Part I. Comment 13, at 88 (ASMP)(increase in price is incremental), App. Part I.

²¹ Comment 7, at 30 (National Artists Equity Association), App. Part I. See also Comment 14 at 100, (Volunteer Lawyers for the Arts)(royalties would not hurt market which is used to incurring charges on sales of art work, and a number of collectors are art lovers, who purchase for more than commercial gain), App. Part I.

²² Comment 15, at 118 (Professor Goetzl)(despite five percent royalty California art market is thriving. Seller will sell where demand for work is greatest), App. Part I.

²³ New York Hearing at 203 (statement of John Koegel), App. Part III.

works; ²⁴ royalties would increase the complexity of transactions and possibly diminish the initial value of works; ²⁵ a "tax" on visual arts, which can be readily substituted by another commodity, would alter the pattern of demand and reduce prices and sales volume; ²⁶ few works of living artists appreciate in value, and losses from the risky purchases are not tax deductible, discouraging collectors from acquiring contemporary art; ²⁷ and the art market will be pushed underground or overseas. ²⁸

Both Professor Merryman and Mr. Weil emphasized that the artist may really suffer from a resale royalty since most artists will not have a secondary market, and the implementation of a resale will further depress the price of the primary market. ²⁹ Professor Merryman pointed to a survey by Tom Camp reporting

²⁴ San Francisco Hearing at 31 (statement of Professor Merryman), App. Part II; New York Hearing at 48-49 (statement of Christiane Ramonbordes)(artists will accept less in primary market because of anticipated royalty on resale), App. Part III.

²⁵ Comment 9, at 39 (The New York Patent Trademark and Copyright Law Association), App. Part I.

²⁶ Comment 11, at 69 (Art Dealer's Association of America (hereinafter ADAA), App. Part I. Additionally, a two or three percent difference in commission or quote may be enough to lose business to another auction house. And since major works of art are highly portable, a seller will take the work to a place where transaction costs are smallest. New York Hearing at 243 (statement of Mitchell Zuckerman, President of Sotheby's Financial Services Incorporated), App. Part III.

²⁷ Comment 11, at 70 (ADAA), App. Part I. Cf. New York Hearing at 28 (statement of Stefan Andersson of the Federation Internationale de Diffuseurs D'Art Originales [hereinafter FIDOA0]) and President of the Swedish Gallery Association)(resale royalties are punishment for not keeping art work), App. Part III.

²⁸ New York Hearing at 200 (statement of John Koegel), App. Part III.

²⁹ New York Hearing at 223 (statement of Stephen E. Weil, Deputy Director of the Hirshorn Museum and Sculpture Garden)(Vanderbilt University study in 1978 found that royalties depressed prices in the primary market and that most artists never made up the initial loss), App. Part III; San Francisco Hearing
(continued...)

on a period between 1972-1977 which indicated that only about 150 out of 200,000 living artists had any resale market.³⁰

A more recent survey undertaken in 1986 by the Bay Area Lawyers for the Arts (BALA) reported that only three out of the thirty-six visual artists responding to the questionnaire³¹ had received royalties under the California statute. Only four of the fifteen art dealers responding³² indicated that they had handled resale royalties for a total of twenty-two such sales since 1977.³³

²⁹(...continued)

at 31 (statement of Professor Merryman) (99.9 percent of artists have no resale market and will suffer from royalties because of the depressive effect on the primary market), App. Part II.

³⁰ This survey conducted by Tom Camp, between the years 1972 and 1977, suggested that the figures today are not much better: 300 out of about 400,000. San Francisco Hearing at 33, App. Part II. The survey is based on original or unique works created by an American artist and resold at one auction house for over \$500.00 during the life of the artist or within five years of the artists' death. Records were kept for a five year period, but records were also kept for 1977 auctions of the works of living and recently dead foreign artists' works resold for over \$1000. The surveyor also interviewed representatives of eight art galleries to get information on their art resales. See Tom Camp, Art Resale Rights and the Art Resale Market: An Empirical Study, 28 Bull. Copyright Society of the U.S. 146-83 (1980).

As some indication of this sporadic resale market, one artist James Rosenquist stated that during his 31 year career the highest frequency of resale of his work "has been maybe four times a picture. Sometimes only once." New York Hearing at 155.

During the 1990-91 season at Sotheby's and Christies, only 219 living American artists met the threshold standard for resale, of works valued at \$10,000 or more. New York Hearing at 213 (statement of Steven Weil), App. Part III. Of course, these numbers account only for auction sales at two houses.

³¹ This survey was sent to 208 visual artists in the San Francisco area.

³² This survey was sent to eighty-one galleries and auction houses in the San Francisco area.

³³ Several witnessess referred to this survey at the San Francisco Hearing. See e.g., San Francisco Hearing at 21 (statement of Alma Robinson), App. Part II. A more detailed discussion of this survey can be found in Chapter II, supra at text accompanying 38-47.

Neither the Camp nor the BALA survey is based on complete data; however, the BALA survey also suggests that not many artists currently enjoy a resale market. As attorney Peter H. Karlen emphasized at a recent international meeting on artists rights, the California statute has had little impact on the art market in California. Karlen observed:

Artists typically don't collect these royalties because (1) they are not too concerned about collecting them, (2) they do not know where all their works are located nor who the owners are, so they are not able to collect them anyway, and (3) when they do know of a sale, they are often reluctant to demand the royalty for fear of offending an important dealer or collector. Collectors and dealers don't usually pay these royalties simply because they (1) feel they can get away with not paying, (2) still resent paying these royalties based on the notion that, because they paid for the work of art, they should own it unencumbered by the artist's claims, and (3) know the artist is unaware that the work is being sold by them.³⁴

Other witnesses at the San Francisco Hearing confirm what Mr. Karlen has reported. Both sculptor Richard Mayer, Vice President of National Artists Equity,³⁵ and Eleanor Dickinson, Vice President of Artists Equity Association, and Vice President of California Lawyers for the Art note that some artists benefitted from the California law. But they also point out that many artists

³⁴ See Peter H. Karlen, U.S. NATIONAL REPORT ON RIGHTS OF ARTISTS AND THE CIRCULATION OF WORKS OF ART, report for the Fourth Symposium on Legal Aspects of International Trade in Art, Institute of International Business Law and Practice, International Chamber of Commerce at 15 (forthcoming from ICC Publishing, 1993).

³⁵ Robert Arnison received \$25,520 in resale royalties during an eight year period; Painter Mel Ramos reported earning about \$20,000 between 1988 and 1991. San Francisco Hearing at 44-45 (statement of Richard Mayer), App. Part II. See also San Francisco Hearing at 51 (statement of Eleanor Dickinson), App. Part II.

do not collect either because the system is underenforced ³⁶ or they can get more money through their own contracts with buyers. ³⁷

Several commentators urged that adopting a resale right had already diminished the sale of contemporary art in California. As evidence, they claimed that Sotheby's had basically stopped selling contemporary art in California after the resale royalty law went into effect. ³⁸

Moreover, because art is easily transportable, opponents argue that enacting a royalty right in the United States will weaken the U.S. market in favor of England and Switzerland, countries that do not have the right. ³⁹

Even Professor Merryman admits that the California experience is not a good place to look for empirical evidence. ⁴⁰ It is too early to determine what effect, if any, the resale royalty has had on the California art market since it is apparently underenforced. Comparing art transactions in countries that have a resale royalty with countries that do not have one, should produce a clearer understanding of whether or not long term application of droit de suite has shifted the European art market to countries without a resale royalty.

³⁶ See generally discussion in Chapter II, supra at text accompanying notes 50-60.

³⁷ See generally discussion of Projansky agreement in Chapter II, supra at text accompanying notes 8-14.

³⁸ San Francisco Hearing at 33-34 (statement of Professor Merryman), App. Part II. There is considerable debate about the significance of Sotheby's closing its operation in California. See notes 64 and 65 supra, in Chapter II.

³⁹ Mr. Zuckerman stated that those countries which have droit de suite do not have any significant contemporary art market. New York Hearing at 243, App. Part III.

⁴⁰ San Francisco Hearing at 37 (statement of Professor Merryman), App. Part II.

There again we received mixed reports. Both of the French collecting societies ADAGP and SPADEM asserted that the droit de suite had not harmed the French art market. Moreover, in his written comments Mr. Gutton asserted: "The most important auction houses in the United Kingdom, Switzerland and the Netherlands, where this law does not exist, do not obtain a turnover very much higher in this field than France or Germany." ⁴¹ Mr. Gutton also emphasized that auction sales have tripled in France in the last few years. ⁴² In fact ADAGP reported a dramatic increase in royalties collected on the French art market subject to droit de suite from \$2.35 million U.S. in 1988 to \$9.4 million U.S. in 1990. ⁴³ SPADEM also asserted that droit de suite "does not serve as an impediment to either [an artist's] artistic career or the art market." ⁴⁴

The German collecting society Bild-Kunst reported collecting 7.5 million Deutsche marks on resale royalties in 1990, ⁴⁵ and it also reported that there was no evidence that the German art market lost sales to nations that have no Folgerecht (resale royalty). ⁴⁶

⁴¹ Comment 17 at 189, (ADAGP), App. Part I.

⁴² Id.

⁴³ In a telephone call, Mr. Gutton, the Managing Director of ADAGP, reemphasized that the economic data he had submitted earlier revealed that the French art market was as successful as other important places in Europe or the United States.

⁴⁴ Comment 10, at 47 (Société Des Auteurs Des Arts Visuels [hereinafter SPADEM]), App. Part III. Translated by Jean Christophe Ienne.

⁴⁵ Comment 17, at 197 (Bild-Kunst), App. Part I at 197.

⁴⁶ Letter from Mr. Gerhard Pfennig, the Managing Director of Bild-Kunst, to Mr. Ralph Oman, Register of Copyrights (October 14, 1992). Mr. Pfennig reports that there have not been any complaints about the loss of sales to other countries since Bild-Kunst and the organizations of the German art market came to a general agreement on the payments of droit de suite in 1981. He notes that there may be Germans who sell their work in England or Switzerland for others reasons such as property taxes. Id.

Mr. Pfennig, the Managing Director of Bild-Kunst, submitted a report on a survey of EC countries with droit de suite. Experiences in these countries confirmed "that art trade stays in traditional locations and environments."⁴⁷ This same survey reports that both France and Germany collect significant droit de suite royalties implying that both have important contemporary art markets.⁴⁸

In opposition to statements by the collecting societies that there has been little or no effect on the art market, Mr. Champin, President of the *Chambre Nationale des Commissaires Priseurs*, (organization of French auction houses) asserted that the French Market is disadvantaged compared to London, the other European center for modern art sales. He observed that the transportation costs seemed reasonable when compared with the 3% royalty.⁴⁹

We do not have any economic data on contemporary art sales in countries without such a royalty. In order to evaluate the significance of the contemporary art market in those countries with droit de suite versus those without, we would need more concrete information on sales made, sales transferred, and any other factors that might cause a seller to choose a particular art market.

⁴⁷ See Attachment No. 2, "EVA: Answers to the Questionnaire on Droit de Suite in the European Community," App. Part I at 211. EVA (European Visual Artists) is a lobby group working in the European Community.

⁴⁸ *Id.* at 208.

⁴⁹ Letter of Gérard Champin, President *Chambre Nationale des Commissaires Priseurs*, to Mr. Ralph Oman, Register of Copyrights, September 30, 1992. Bild-Kunst has brought a law suit against a German national who sold art in London. This suit could settle the issue of whether a national of a droit de suite country is exempt from a payment if he or she sells a work in a non-droit de suite country. Comment 17, Att. No. 1, statement of International Confederation of Societies of Authors and composers (CISAC) concerning Resale Royalties (*Droit de Suite*) at 202-203, (Bild-Kunst), App. Part I.

2. Suggested Form of Resale Royalty

Commentators also disagreed on the kinds of works to which a royalty should apply. Four referenced the VARA in their responses, but despite this common thread, their interpretations differed.⁵⁰ Others suggested limiting royalties to a broadened definition of paintings and sculptures;⁵¹ graphic and plastic works made in single or a small number of copies;⁵² paintings, drawings, collages, assemblages, sculptures and monoprints, as well as prints and fine art photographs in limited editions;⁵³ and all photos and works of graphic and plastic arts, including works made in several copies, if the art market considers them original works.⁵⁴ One commentator even suggested that instead of defining art, Congress should use the Internal Revenue Service standard to define artists.⁵⁵

As noted in our earlier discussion of the application of droit de suite in other countries, works defined as covered in those countries range from

⁵⁰ New York Hearing at 138 (statement of Daniel Mayer)(royalty should apply to original works of visual art receiving moral rights protection under VARA), App. Part III. See also Comment 5, at 22 (Committee for America's Copyright Community [hereinafter CACC])(include items "parallel to" those in VARA, but limit application to original embodiment); Comment 13, at 84-85 (American Society of Magazine Photographers [hereinafter ASMP])(extend royalty beyond works covered under VARA to include photographs not produced for exhibition purposes); Comment 14, at 102 (VLA)(include all works under VARA plus illustrated manuscripts and works of art in glass), App. Part I.

⁵¹ Comment 8, at 33 (ARS), App. Part I.

⁵² Comment 10, at 45 (SPADEM), App. Part I.

⁵³ Comment 15, at 122 (Professor Goetzl), App. Part I.

⁵⁴ Comment 16, at 189 (ADAGP), App. Part I.

⁵⁵ San Francisco Hearing at 52 (statement of Eleanor Dickinson), App. Part II. IRS gives ten standards on how to determine a professional artists. Id.

"paintings, sculptures, drawings, and engravings" ⁵⁶ to "graphic and plastic arts" ⁵⁷ to "all works." ⁵⁸ Those countries maintaining that droit de suite applies to all works have not really enforced the right. ⁵⁹ The current California provision applies the royalty to paintings, sculptures, drawings, and works of art in glass.

It makes more sense to tie any U.S. system to works already covered under the VARA. Any implementation of the right will require some consideration of what kind of limitation to place on the number of unique works that may be considered original. As discussed earlier, the French law contains very specific limitations. ⁶⁰

Commentators also disagreed about the proper threshold amount that should be set for application of a resale royalty. Suggested amounts triggering the royalty ran the gamut from two hundred to five thousand dollars. ⁶¹ It is,

⁵⁶ Belgium law. See Table 1.

⁵⁷ French law, Table 1. Under French Law, creators of items like original furniture, which are not protected under U.S. copyright law, still receive resale royalties. Should Congress decide to grant resale royalties for works of visual art not subject to copyright, one commentator has suggested that such rights could be grounded in the Commerce Clause, rather than the Copyright Clause. See San Francisco Hearing at 62 (Professor John Merryman), App. Part II.

⁵⁸ See Table 1.

⁵⁹ Id.

⁶⁰ See discussion in Chapter I of this Report. See also Comment 5, at 22 (Committee for America's Copyright Community [hereinafter CACC])(limit application to original embodiment and not any duplication or copies), App. Part I.

⁶¹ Comment 16, at 189 (ADAGP)(\$200); Comment 13 at 90 (ASMP)(\$250); Comment 8 at 33 (ARS)(\$500 plus or minus \$250). Two commentators supported a \$750 threshold, see Comment 14 at 105 (VLA); New York Hearing at 138 (statement of Daniel Mayer). Two others indicated that it should be \$1000, see Comment 9 at 40 (VLA); San Francisco Hearing at 50 (statement of Eleanor Dickinson. One commentator suggested the amount should perhaps be as high as \$2000, Comment 15 (continued...)

of course, clear from the testimony that the higher the amount before a royalty is triggered, the fewer artists will participate in proceeds from sales. Ms. Robinson observed that establishing a \$500 threshold instead of the \$1000 mandated in California law would at least triple the amount of artists eligible to participate in resales.⁶²

On the other hand, the lower the amount set to trigger the resale right, the greater the administrative burden will be; and at some point, that burden will outweigh any value given to artists.⁶³

Commentators also differed as to the appropriate percentage of the sales price that should be assessed as the artist's participation royalty. Amounts suggested were as little as one percent⁶⁴ and as high as fifteen percent of the profits.⁶⁵ Most of the commentators suggested an amount between three and five percent.⁶⁶ Several commentators indicated that the 7 percent suggested in the Kennedy-Markey bill was too high, especially if applied to the

⁶¹(...continued)
at 122 (Professor Goetzl), and another \$2000 in combination with a two percent royalty, Comment 6 at 25 (VISUAL). A \$5,000 threshold was suggested by a representative of New York Artists Equity, New York Hearing at 145 and by an attorney, Comment 18 (Richard Covel, Esq.).

⁶² San Francisco Hearing at 22 (statement of Alma Robinson), App. Part II. See also Comment 8, at 33 (ARS), App. Part I.

⁶³ See Comment 8, at 33 (ARS); Comment 17 at 189 (ADAGP), App. Part I.

⁶⁴ San Francisco Hearing at 38 (statement of Professor Merryman) (one percent override used for welfare of artists), App. Part II.

⁶⁵ See New York Hearing at 158 (statement of James Rosenquist); see also discussion of Projansky contract, New York Hearing at 74 (statement of John Weber), App. Part III;

⁶⁶ See generally Comment 14, at 102-106 (VLA), App. Part I. See also New York Hearing at 101 (statement of ARS), App. Part III.

total sales price instead of the appreciated value.⁶⁷ Countries where droit de suite has been successfully administered have generally based the right on three to five percent of the total sales price.⁶⁸

All of the commentators addressing the issue except two,⁶⁹ stated that the royalty should be applied regardless of whether or not a work increases in value,⁷⁰ and that there should be no adjustment for inflation.⁷¹ Again the successful European systems have applied the droit de suite or Folgerecht on the total sales price, primarily for ease of administration. As discussed earlier, those countries which have tried to apply a resale right on the increased value of the work, if any, have had problems in implementing the right.⁷²

⁶⁷ Apparently as first drafted, this bill meant the resale royalty to apply to the appreciated value of a work. See San Francisco Hearing at 11 (statement of Professor Goetzl), App. Part II.

⁶⁸ See Table 1.

⁶⁹ Comment 12, at 81 (Lawyers for the Creative Arts) (royalty should be calculated based on added value); Comment 9, at 40 (New York Patent, Trademark and Copyright Law Assoc.) (royalty should not apply unless work increases in value by a certain value such as 25%), App. Part I.

⁷⁰ San Francisco Hearing at 17 (statement of Professor Goetzl) (should be royalty even if loss because sale provides next audience for work); id. at 35 (statement of Alma Robinson) (system easier to administer if royalty applied to every sale); id. at 78 (statement of Eleanor Dickinson) (apply royalty even if loss because purchaser took risk with purchase and had enjoyment of work over time).

The royalty should be based on total resale price. See New York Hearing, at 19, 36 (statement of Jean-Marc Gutton); at 101 (statement of Ted Feder); at 121-22 (statement of Robert Panzer); at 137 (statement of Daniel Mayer), App. Part II. See also Comment 8, at 33 (ARS); Comment 13, at 90-9 (ASMP); Comment 14, at 105-6 (VLA); Comment 15, at 122 (Goetzl); Comment 16, at 190 (ADAGP); Comment 17, at 197-98 (Bild-Kunst), App. Part I.

⁷¹ Comment 9, at 40 (New York Patent, Trademark and Copyright Law Assoc.); see Comment 14, at 105-6 (VLA) (if royalty paid on gross sales price, no need to adjust for inflation because the royalty is paid in inflated dollars), App. Part I.

⁷² See Table 1.

3. Recipients of Royalties and International Implications

The European Community has resale royalties on its agenda for harmonization and may put pressure on non-royalty countries, like the United Kingdom, to conform.⁷³ Several commentators noted that the United States' recognition of such rights would support the current European efforts at collaboration.⁷⁴ Others declared that royalties should be extended to foreign artists whose works are sold in the United States;⁷⁵ to do otherwise, they stated, would violate Article 14~~ter~~ of the Berne Convention, and U.S. artists would be excluded from royalties if the United States did not have a law granting such rights.⁷⁶ Still others suggested that either U.S. citizenship or residency, be required to entitle an author to payment,⁷⁷ whether or not the work is created here.⁷⁸ Those who suggest citizenship, however, note that the

⁷³ See discussion on the European Community, Chapter I, supra at notes 221-229 and accompanying text.

⁷⁴ See Comment 14, at 102 (VLA), App. Part I; New York Hearing at 138 (statement of Daniel Mayer), App. Part III.

⁷⁵ New York Hearing at 103 (statement of Ted Feder) (ARS), App. Part III. Comment 6, at 29 (VISUAL); Comment 14, at 102 (VLA); Comment 16, at 190 (ADAGP). See Comment 17, at 190 (Bild-Kunst)(extend royalty to all Berne members), App. Part I.

⁷⁶ New York Hearing at 103-04 (statement of Ted Feder), App. Part III. Comment 6, at 29 (VISUAL); Comment 16, at 190 (ADAGP), App. Part I.

⁷⁷ New York Hearing at 138 (statement of Daniel Mayer), App. Part III; Comment 9, at 40 (New York Patent Trademark and Copyright Law Assoc.); Comment 13, at 91 (ASMP); Comment 14 at 107 (VLA); and Comment 15, at 123 (Goetzl), App. Part I.

⁷⁸ Compare Comment 9, at 40 (New York Patent Trademark and Copyright Law Assoc.)(require creation in United States) with Comment 13, at 91 (ASMP)(grant royalty regardless of where created), App. Part I.

right to resale royalty payments could be expanded in the United States if droit de suite became part of an international convention.⁷⁹

a. Reciprocity. As discussed earlier, the Berne recognition of droit de suite permits reciprocity, and countries now providing such a resale right generally grant the right to foreign artists on the basis of recognition of their artists in the other country.

Since 1956, France has been granting resale royalties to foreign artists who have lived at least five years -- not even consecutively -- in that country.⁸⁰ The Federal Republic of Germany currently extends royalties only to artists of countries that have similar legislation,⁸¹ but the Managing Director of Bild-Kunst believes that following the principles of the Berne Convention, the resale right should be extended to all Berne creators, even where resale royalty legislation does not exist in the other country.⁸² It was even suggested that U.S. artists could claim royalties in Germany retroactively, as soon as the United States passes such legislation.⁸³

b. Retroactivity. This leads to the question of whether the royalty should be applied retroactively. The principle argument advanced in favor of retroactivity is that it would give U.S. artists the right to royalties in other countries. However, one major problem with retroactivity is that newer and older works have different standards of protection. Copyright vests in most

⁷⁹ See Comment 9, at 40 (New York Patent Trademark & Copyright Law Assoc.); Comment 14 at 91 (ASMP), App. Part I.

⁸⁰ Comment 16, at 189 (ADAGP); Comment 10, at 46 (SPADEM), App. Part I.

⁸¹ See Comment 17, at 198 (Bild-Kunst), App. Part I.

⁸² Id.

⁸³ Id. This would, of course, depend on whether U.S. legislation was retroactive or prospective only.

European works automatically and without any formalities at the moment of creation. However, if the creators did not meet U.S. formalities before March 1, 1989 -- the effective date of U.S. adherence to Berne -- their works may have passed into our public domain.

Commentators disagreed about whether royalties should apply to works in existence at the date of enactment of the legislation,⁸⁴ or to works protected in the country of origin at that time.⁸⁵ At the New York Hearing, Mr. Feder made the following distinction:

The terms retroactive and prospective should be employed in their proper context here, (as understood by our Berne partners), namely that the date of the secondary sale and not the date of the work's creation be the determining factor. Consequently there would be no retroactive application of the resale royalty in the sense that the royalty could never apply to auction sales which took place prior to the effective date of the law.⁸⁶

Mr. Feder also maintained that the failure to apply Berne to existing European works in this context, would violate Article 18(1) of the Berne Convention.⁸⁷

Several other commentators agreed with Mr. Feder that the resale royalty right should apply to prospective sales even on works created before the

⁸⁴ Comment 14, at 109 (VLA), App. Part I.

⁸⁵ Comment 16, at 190 (ADAGP), App. Part I.

⁸⁶ New York Hearing at 107 (statement of Ted Feder) App. Part III (emphasis added).

⁸⁷ New York Hearing at 104-07 (statement of Ted Feder), App. Part II; Comment 8, at 3 (ARS), App. Part I. See also New York Hearing at 20 (statement of Jean-Marc Gutton)(apply resale royalty retroactively to living artists and those who died less than 50 years ago, to allow U.S. artists to benefit in European Community countries where reciprocity is required), App. Part II.

effective date of enactment of a resale royalty.⁸⁸ They felt that future transactions on such works would not disrupt settled expectations. In support of this position, one organization urged that "application of the resale royalty requirement to existing works would have tremendous beneficial effects for American artists who presently do not share in profits from resale of thousands of existing works of art."⁸⁹

Other commentators simply opposed retroactivity without clarifying how they interpreted the term.⁹⁰

4. Nature of Resale Royalty Right

California law provides royalties for the life of the artist, with a descendible additional term of 20 years.⁹¹ In the foreign countries examined, droit de suite is keyed to the copyright term for authors. In France, the right endures for the life of the artist plus 50 years.⁹² In Germany, the right exists for the life of the artist plus 70 years.⁹³ Even in Belgium, where the right is not part of the copyright act, the term is still tied to the other rights that an author enjoys.⁹⁴ Except for one recommendation that the

⁸⁸ See Comment 13, at 92 (ASMP). See also Comment 15, at 122 (Professor Goetzl), App. Part I.

⁸⁹ See Comment 13, at 92-93 (ASMP), App. Part I.

⁹⁰ Comment 9, at 44 (New York Patent & Trademark Copyright Law Assoc.), App. Part I. James Rosenquist, an artist, stated that he was for a 15 percent royalty but not a retroactive law. New York Hearing at 158, App. Part III.

⁹¹ San Francisco Hearing at 33 (statement of Alma Robinson), App. Part II.

⁹² New York Hearing at 38 (statement of Jean-Marc Gutton), App. Part III. Comment 10, at 44 (SPADEM), App. Part I.

⁹³ Comment 17, at 190 (Bild-Kunst), App. Part I.

⁹⁴ See Table 1.

royalty term should be life plus a period not to exceed 75 years,⁹⁶ there was uniform recommendation of a descendible copyright term of life plus 50 years.⁹⁸

5. Administration and Collection of Resale Royalty

The California resale royalty system relies on private royalty enforcement, and that state's experience has been fraught with problems.⁹⁷ Key among them is the fact that artists are not always aware of sales of their works, and that even when they are, they fear retribution after demanding royalties from sellers or galleries.⁹⁸ Artists are also concerned with the expense of litigation in enforcing their rights.⁹⁹ There was, consequently, almost uniform endorsement of collection societies, instead of private enforcement of rights.¹⁰⁰

⁹⁶ New York Hearing at 146 (statement of Jeffrey Homan), App. Part III.

⁹⁸ New York Hearing at 20 (statement of Jean-Marc Gutton); *Id.* at 102 (statement of Ted Feder); *Id.* at 138-39 (statement of Daniel Mayer), App. Part III; See also Comment 8, at 34 (ARS); Comment 9, at 41 (New York Patent Trademark & Copyright Law Assoc.); Comment 13, at 91 (ASMP); Comment 14, at 108 (VLA); Comment 15, at 123 (Goetzl); Comment 16, at 190 (ADAGP), App. Part II. But see New York Hearing at 121-22 (statement of Robert Panzer)(if heirs not known, royalties should go to artists who need the money), App. Part III.

⁹⁷ See Karlen, supra note 34 and accompanying text.

⁹⁸ San Francisco Hearing at 7-8 (statement of Professor Goetzl), App. Part II. See New York Hearing at 93 (statement of Hans Haacke)(artists would not fear retribution if uniform federal legislation), App. Part III. Comment 15, at 124-5 (Goetzl), App. Part I.

⁹⁹ See San Francisco Hearing at 26 (statement of Jack Davis); (suggests dispute resolution mechanisms because litigation too expensive); *Id.* (statement of Jack Davis)(suggests right to attorney's fees for court or alternative dispute resolution, otherwise cost is deterrent to enforcing rights), App. Part II.

¹⁰⁰ San Francisco Hearing at 7-9 (statement of Professor Goetzl); *Id.* at 58 (statement of Jerome Carlin); App. Part II. New York Hearing at 139 (statement of Daniel Mayer), App. Part III; Comment 8, at 36 (ARS); Comment 13, at 93 (ASMP); Comment 14, at 111-12 (VLA); Comment 16, at 190-91 (ADAGP); Comment 17, at 199 (Bild-Kunst), App. Part I; See also San Francisco Hearing at 16 (continued...)

a. Collecting societies. Commentators generally agreed with the conclusion noted in the WIPO-UNESCO study, that collection of droit de suite must be done through authors' societies.¹⁰¹ Only those countries with active and efficient national authors' societies, such as SABAM in Belgium, Bild-Kunst in Germany, and SPADEM and ADAGP in France, have effectively implemented the droit de suite.¹⁰² Those liable to pay the droit de suite have a single, centralized system to which they provide the basic information (the work and the sale price) and pay a percentage of their turnover; artists, through their society, take charge of the material and financial arrangements involved.¹⁰³

It is said that the right is most efficiently administered collectively in France, a country long familiar with monitoring and collecting the resale royalty.¹⁰⁴ There, by agreement, auction houses send sales

¹⁰⁰(...continued)

(statement of Jack Davis)(use Internal Revenue Service or other agency audit as part of enforcement of royalty obligation), App. Part II; Comment 12, at 81 (Lawyers for the Creative Arts)(use Copyright Royalty Tribunal), App. Part I. But see Comment 2, at 2 (Yanick Lapuh)(proposing system where dealers involved in resale should collect royalty; or seller, if no dealer); Comment 4, at 13 (statement of Michael L. Ainslie, CEO of Sotheby's Holdings, Inc., at 1987 Hearing on S. 1613)(costs and administrative burdens of collection greatly exceeded revenue collected in West Germany; compliance virtually nonexistent in California); Comment 11, at 73 (ADAA's statement in opposition to H.R. 3321)(artist free to include provision in original sales contract to get resale royalty), App. Part I.

¹⁰¹ See World Intellectual Property Organization and United Nations Educational, Scientific and Cultural Organization "Study on Guiding Principles Concerning the Operation of 'Droit de Suite'," (1985) (WIPO-UNESCO study), at 69 ("All the administrative work of checking, collecting and apportioning the sums received...can only be carried out by a joint body for the administration of rights.").

¹⁰² Id.

¹⁰³ Id.

¹⁰⁴ There, \$16 of every \$20 collected goes to artists. New York Hearing, at 14 (statement of Jean-Marc Gutton). With more than 400 auctioneers in the
(continued...)

catalogues to the collection societies, ADAGP or SPADEM, before each sale. After a sale, the houses send statements to the collecting society with sales prices, amounts of resale royalties, and other information. After resolution of administrative commissions and costs, the collecting society pays its members. The payment is accompanied by a statement containing, among other information, the name of the work involved, the name of the auction house, the place of the sale, the sales price and the applicable resale royalty.¹⁰⁵ Eighty-five percent of ADAGP's royalties are distributed to its membership of living artists, with the remaining 15 percent going to members' heirs.¹⁰⁶

An international network of societies which manage artists' reproduction rights in 26 countries already exists. These are societies that manage the rights of artists, or authors and artists.¹⁰⁷ They are grouped in

¹⁰⁴(...continued)
country, Mr. Gutton explained, it is difficult for individual artists to enforce their rights without the benefit of a collective society. *Id.* at 40, App. Part III.

¹⁰⁵ New York Hearing at 40 (statement of Jean-Marc Gutton), App. Part III.

¹⁰⁶ *Id.* at 33 (statement of Jean-Marc Gutton), App. Part III. See Chapter I of this Report for a discussion of the social security payment made in France by gallery owners. The German collection society, Bild-Kunst, also has a social security fund for artists. New York Hearing at 43, App. Part III. And although Sweden's law does not contain a resale royalty, its artists have suggested that a ten percent fee from each resale should go into an artists' fund for social security. *Id.* at 50 (statement of Stefan Andersson), App. Part III.

¹⁰⁷ Lillian de Pierredon-Fawcett, The Droit de Suite in Literary and Artistic Property, 133 (1991). She cites: V.B.K. (Austria), Artists Rights Society and VAGA (United States), SPADEM and ADAGP (France), Bild-Kunst (Germany), Beeldrecht (Netherlands), KRO (Sweden), DACS (United Kingdom), ONDA (Algeria), SABAM (Belgium), Jus Autor (Bulgaria), SOCADRA (Cameroon), SAYCO (Colombia), LITA and DILIA (Czechoslovakia, one for the Slovak Socialist Republic and one for the Czech Socialist Republic), BURIDA (Ivory Coast), SGAE (Spain), BGDA (Guinea), Artisjus (Hungary), SIAE (Italy), BMDA (Morocco), ZAIKS (Poland), SPA (Portugal), BSDA (Senegal), Proliteris (Switzerland), SODACT (Tunisia), VAAP (USSR), JAA (Yugoslavia), SONECA (Zaire). *Id.*

the Confederation Internationale des Societes d'Auteurs et Compositeurs (C.I.S.A.C.), within the Conseil International des Auteurs des Arts Graphiques et Plastiques et des Photographes, established in 1978. ¹⁰⁸

In the United States, the Artists' Rights Society ¹⁰⁹ or the Visual Artists and Galleries Association, Inc., (VAGA) ¹¹⁰ would be equipped to handle the practical collection of the droit de suite, since these organizations already have an effective distribution system for reproduction rights.

b. Registry of art. Commentators did not agree about the need for a registration requirement in a resale royalty law. Those supporting the need for registration proposed several alternative schemes: creating a national registry of art; ¹¹¹ limiting the royalty right to auction houses, and requiring them to retain royalties in a trust account to be paid over to artists or a collecting agency; ¹¹² requiring sellers to notify and pay artists for resale, but alternatively notifying the Copyright Office when an artist cannot be

¹⁰⁸ Id. at 133.

¹⁰⁹ Artists' Rights Society is an organization which represents the rights and permissions interests in the United States of a number of the European rights societies, notably ADAGP and SPADEM of France and Bild-Kunst of Germany. ARS also acts on behalf of American artists. New York Hearing at 96-97 (statement of Ted Feder of Artists' Rights Society), App. Part III.

¹¹⁰ VAGA is a New York corporation and membership society for American artists and galleries representing American artists. VAGA's functions include protecting artists' copyrights and handling art licensing, reproduction rights clearance, and royalties collection for artists. Founded in 1976, VAGA is a membership association which distributes to its members all income after deducting expenses. VAGA, "Ten Brief Functions of VAGA" (1992). See also New York Hearing at 111 (statement of Robert Panzer of VAGA), App. Part III.

¹¹¹ San Francisco Hearing at 66 (statement of Professor Goetzl), App. Part II.

¹¹² New York Hearing at 122 (statement of Robert Panzer), App. Part III.

located; and recording sales in the Copyright Office, with constructive notice given to the record.¹¹³

One commentator proposed the establishment of a national registry administered by the Register of Copyrights. Each work would be given a registration number and the artist would pay the registration fee. The artist would then receive a document, which would be transferred to the buyer at the time of sale. Possession of the document would indicate clear title for a subsequent reseller. The buyer would transmit a five percent royalty to the Register, for the Copyright Office to disburse to artists.¹¹⁴

Another proposal would require sellers of art to report transactions to the Register of Copyrights. The information would include the identity of the seller, the date of the sale, the selling price, and the amount of the royalty. The initial sales price would be reported by the artist or his representative. As an enforcement mechanism, the seller would have to pay the artist three times the amount of the royalty for failure to record the sale.¹¹⁵

Finally, a third commentator suggested that using the already existing Copyright Royalty Tribunal might be a more efficient means of collecting and distributing royalties than starting a new artists rights society. In this

¹¹³ Comment 9, at 41 (New York Patent, Trademark & Copyright Law Assoc.), App. Part I.

¹¹⁴ New York Hearing at 144-45 (statement of Dan Homan), App. Part III.

¹¹⁵ Comment 13, at 93 (ASMP); See also Comment 14, at 112 (VLA); See Comment 18, at 212 (Covel)(civil fines and double royalty payments); Comment 9, at 41 (New York Patent, Trademark and Copyright Law Assoc.)(if reseller did not give notice to artist of sale, statute of limitations on collecting royalty would not run until artist received actual notice); New York Hearing at 81-82 (statement of John Weber)(certificate of authenticity tied to paying royalty), App. Part III.

model, artists would register their works, with their names and addresses, in a central registry as a precondition to making royalty claims.¹¹⁶

Those who opposed registration invoked the privacy interests of parties to art transactions in not having their purchases and sales prices made public.¹¹⁷ The technology presently exists to track at least auction sales, but, as registration opponents maintain, significant privacy issues will be raised. One expert has developed systems, used primarily to locate stolen works of art, that are capable of retrieving images of art works. The systems record and transmit images by telephone transmission or through optical media. One system, called Art Lost Register, compares registered works against works registered for auction or police inquiries. Another system, monitoring worldwide art sales, consists of a series of stations that scan the art catalogues of various auction house. Information is placed on optical disks, and an access charge is based on a combination of yearly subscription rate and an each time user fee.¹¹⁸ Artists could use these systems to monitor their works -- if dealers and galleries also supplied sales information -- but the information would have to be made available publicly, or at least to the scanning systems.¹¹⁹

¹¹⁶ Comment 12, at 81 (Lawyers for the Creative Arts), App. Part I.

¹¹⁷ New York Hearing at 198-99 (statement of John Koegel); *Id.* at 233 (statement of Gilbert Edelson), App. Part III.

¹¹⁸ New York Hearing at 186-88 (statement of Thomas Dackow), App. Part III.

¹¹⁹ *Id.* at 192-95.

Finally, commentators agreed that there should be no royalty for gift transactions.¹²⁰ However, there was disagreement on whether a sale should be required for the royalty to kick in, or whether a barter arrangement would be enough to trigger obligation for a royalty payment.¹²¹

6. Waiver and Alienation of Royalty

Commentators favoring free alienability argued that a non-waivable right would interfere with the ability to contract¹²² and that waiver is necessary to encourage the risky purchase of works of young artists,¹²³ to satisfy debts,¹²⁴ and for assignment to societies for collection and enforcement.¹²⁵ Except to enforce collection,¹²⁶ however, the remainder opposed making the right waivable or alienable,¹²⁷ lest young artists be pressured into waiving their rights.¹²⁸

¹²⁰ New York Hearing at 109 (statement of Ted Feder), App. Part II. Comment 13, at 94 (ASMP), App. Part I.

¹²¹ Compare New York Hearing at 109 (statement of Ted Feder)(sale required for royalty) with Comment 9, at 91 (ASMP)(royalty if barter transaction worth more than \$1,000), Comment 13, at 94-95 (ASMP)(royalty if barter value of \$250 or more) and Comment 14, at 114 (VLA)(royalty if barter value exceeds undesignated threshold amount), App. Part I.

¹²² New York Hearing at 199 (statement of John Koegel), App. Part III.

¹²³ See Comment 11, at 6 (ADAA), App. Part I.

¹²⁴ Comment 12, at 81 (Lawyers for the Creative Arts), App. Part I.

¹²⁵ Comment 13, at 94 (ASMP), App. Part I.

¹²⁶ San Francisco Hearing at 14 (statement of Professor Goetzl); Comment 14, at 18.

¹²⁷ Comment 2, at 2 (Yanick Lapuh), App. Part I. New York Hearing, at 102-03, 110 (statement of Ted Feder); *Id.* at 146 (statement of Jeffrey Homan), Part III.

¹²⁸ New York Hearing, at 90, 92 (statement of Hans Haacke), App. Part III; Comment 8, at 36 (ARS); Comment 14, at 114-15 (VLA), App. Part I.

7. Preemption of California Law

As discussed earlier in this report, the California law has already been challenged in judicial proceedings as being preempted by copyright law. It survived a challenge under the 1909 Copyright Act, but several commentators and legal experts believe it is preempted by the 1976 Copyright Act.¹²⁹

All commentators addressing the issue favored preempting California's law if a national resale royalty law were passed.¹³⁰ One suggested, though, that states should be free to provide greater levels of protection than the federal minima.¹³¹ Mr. Gutton of France noted that the California law was very restrictive and urged that the "scope of federal legislation should be more widely protective."¹³²

¹²⁹ See discussion in Chapter II of this Report.

¹³⁰ Comment 15, at 126 (Goetzl); Comment 14, at 114 (VLA), App. Part I.

¹³¹ Comment 15, at 126 (Goetzl), App. Part I.

¹³² Comment 16, at 191 (ADAGP), App. Part I.

IV: INTEGRATION OF THE RESALE ROYALTY INTO U.S. LAW

Author's rights have evolved in Europe around the recognition that intellectual creations, particularly in art, deserve special protection.¹ Unlike authors and composers, who are able to distribute identical copies of their works, each having the same value, artists create unique or a limited number of objects. Artists are also different from other authors in that they cannot generally rely on repeated use of copies of their works. And since some argue that works of fine art are exploited with each sale,² whether or not there is a profit, resale royalties rest on the desire to encourage artistic production by guaranteeing creators compensation, as with other economic rights.³

¹ Lillian de Pierredon-Fawcett, The Droit de Suite in Literary and Artistic Property, 17 (1991).

² Paul Katzenberger, The Droit de Suite in Copyright Law, 4 IIC, Int'l Rev. of Indus. Prop. and Copyright L. 361, 367-68 (1973). See San Francisco Hearing at 11-12 (statement of Professor Thomas M. Goetzl)(sale provides another audience for work), App. Part II. Indeed, Professor Goetzl justifies the payment of a royalty, even if there is a loss, on the fact that the sale provides the next audience for a work. The situation is no different, he argues, than a playwright being paid a royalty by a theater company if a play flops, or an author getting to keep an advance for an unsuccessful book. *Id.* Fawcett also argues that the transfer of ownership of an original work is an exploitation of the work. Like Goetzl, she contends that the transfer allows a new group of users to enjoy the work in its most perfect expression, *supra* note 1, at 28.

It has also been maintained, however, that unique works and those that can be produced in numerous copies are not analogous since the triggering event for the former is the substitution of one owner for another, rather than the distribution of another example of the original work. Stephen E. Weil, Resale Royalties: Nobody Benefits, ARTnews 2 (March 1978). In this view, the resales of the original are not exploitations, since no additional work is created.

³ Fawcett, *supra* note 1, at 18-20. It has been argued as an economic matter, though, that records, sheet music, books and reproducible art -- which all may be expanded by additional production -- are not analogous to unique art, which cannot be. Thus, there is no justification for extending a royalty to fine art, which is different in kind and not just degree. See Ben W. Bolch, William W. Damon and C. Elton Hinshaw, An Economic Analysis of the California Art Royalty Statute, 10 Conn. L.Rev. 689, 691 n.9. (1978).

The droit de suite is most frequently justified as compensation for the lack of a marketable reproduction right for works of fine art. With other works, reproduction rights are commercially exploited by the indirect communication of a copy of the work to the public. Droit de suite rewards exploitation by direct communication of the very object.⁴ Only the original, it is believed, can provide complete artistic enjoyment; and transfer of only the original provides a new circle of users with this perfect enjoyment.⁵

Some also argue that the U.S. copyright law has failed to provide economic incentives for visual artists comparable with those granted to authors and composers.⁶ Unlike other creators who can produce and market endless copies of their works, the artist creates one or a very limited number of works--and a critical value of the work is its uniqueness. Authors and composers receive royalties through reproduction and performance rights for all the copies of their works that are exploited.⁷ Visual artists, on the other hand, are paid for the initial sale of their works, have a minimal market for exploiting

⁴ Fawcett, supra note 1, at 54-55.

⁵ Katzenberger, supra note 2, at 368.

⁶ See, e.g., Thomas M. Goetzl and Steuart A. Sutton, Copyright and the Visual Artist's Display Right: A New Doctrinal Analysis, 9 Colum. J. Art & Law 15, 16 (1984).

⁷ See 17 U.S.C. §§ 106(1), (4). In this way, authors who create in many copies maintain a continuing connection with their works. Authors' royalties, however, are subject to their market power at the time of their contract negotiations. If authors are not well-established at this time, they will not have the power to exact large royalties.

their reproduction rights,⁸ and lose their most remunerative right -- that of public display⁹ -- once they sell their creations.¹⁰

Copyright legislation in the United States owes its origin to the constitutional clause providing that Congress shall have the power

[t]o promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.¹¹

Copyright motivates creativity, while encouraging the broad public dissemination of works to the public.¹² Thus, in contemplating changes to the copyright law

⁸ See San Francisco Hearing at 5 (statement of Professor Thomas M. Goetzl)(reproduction not primary market for works of visual art), App. Part II; New York Hearing at 179 (statement of James Rosenquist)(this noted artist paid only \$3,000 in 31 year career for reproduction rights), App. Part III.

⁹ The Canadian government, for example, presently compensates artists for works owned in the government's art bank. San Francisco Hearing at 5 (statement of Professor Thomas M. Goetzl), App. Part II.

¹⁰ Even though the copyright law recognizes a distinction between a work and the material object in which it is embodied, 17 U.S.C. §202, this separation largely disappears where the work is created in only one or an extremely limited number of copies: once a collector has purchased an original painting, for example, the artist no longer possesses either the work or the object to display. Moreover, even if the artist has retained copyright, the First Sale doctrine effectively cuts off his public display right. *Id.*, § 109(c)(owner of copy entitled to display copy publicly). Works may be leased or otherwise alienated without title passing, although this is, no doubt, and unrealistic alternative if purchasers want ownership of paintings, sculptures and other works of fine art that they acquire in the art market.

For all of these reasons many commentators, including Professor Perlmutter, argue that the artist is at an economic disadvantage. Letter from Shira Perlmutter, Assistant Professor Columbus School of Law, Catholic University, to Ralph Oman, Register of Copyrights (November 10, 1992). Professor Perlmutter asserts that "Given the realities of the market for fine art, copyright is often a nearly valueless entitlement for the artist." *Id.* at page 2.

¹¹ U.S. Const., Art. 1, Sec. 8, Cl. 8.

¹² See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). This is also the purpose of the Visual Artists Rights Act of 1990. H.R. Rep. No. 101-514, 101st Cong., 2d Sess. 5 (1990).

-- whether resale royalties constitute authors' rights or are more in the nature of moral rights -- ¹³ this constitutional framework serves as a logical matrix for balancing creator and user rights.

One can argue that the potential for increased remuneration is a potent incentive for further creation. It is not clear, though, whether the royalty is too far removed from the act of creation to be an incentive. ¹⁴ On the other hand, the decreased prices for works of visual art in the primary market -- the consequence of the later royalty payment ¹⁵ -- will not help a

¹³ Because the droit de suite is inalienable, Berne Convention Article 14ter (1), some have concluded that the right is more akin to a moral, than an economic, right. But there is disagreement. One theory is that a work embodies a property interest attached to its creator, and the work sold is the creation, not the art object. The resale royalty has no autonomous existence under this approach, it is merely a consequence of the moral right of paternity. Another perspective is that moral rights and economic rights coexist: the creative personality is protected by moral rights, while the creation which is the fruit of it is protected by economic rights. Fawcett, supra note 1, at 32. Still another view is that the resale royalty is more closely allied with the reproduction right as a pecuniary right and is, thus, part of the author's copyright. Diane B. Schulder, Art Proceeds Act: A Study Of The Droit De Suite And A Proposed Enactment For The United States, 61 Nw. U.L. Rev. 19, 22 (1966). See also Rita E. Hauser, The French Droit De Suite: The Problem Of Protection For The Underprivileged Artist Under The Copyright Law, 6 Bull. Copyright Soc. 94, 110 (1959)(droit de suite is author's right because it protects artist in exploitation of his work).

¹⁴ See, e.g., Comment 15, at 120 (Goetzl)(royalty alone unlikely to either encourage or discourage creation of new works); Comment 16, at 189 (ADAGP)(royalties have no effect because creation is generally independent of economic criteria), App. Part I.

¹⁵ Bolch, Damon & Hinshaw, supra note 3, at 693. In addition to reducing original bid prices, the royalty also forces artists to invest in their own work, sometimes contrary to their best interests. Id. at 695. Moreover, except for well-established artists, who might ultimately benefit from royalties despite the initial price decrease, most artists' works do not increase substantially in value and the resale royalty will not make up for the initial deficiency. Stephen E. Weil, Resale Royalties: Nobody Benefits, ARTnews 5 (March 1978). Weil also contends that the worst problem facing contemporary artists is the lack of a broad initial market for their works, not abuses in the resale market. And what would benefit them most is an increase in the funds available to purchase art in the primary market. Id.

damaged contemporary art market. And with increased sales charges, institutional collectors, such as museums, will be discouraged from taking risks on portfolios of contemporary art.¹⁶ Yet the royalty cost may be absorbed like other costs associated with art transactions, without causing a ripple in the art market.¹⁷ The essence of the resale royalty is the disparity between the initial sales price and the price for which a work is later sold.¹⁸ This concept fits easily within the Continental systems that recognize a continuing relationship between an artist and his work, even after it has been sold.¹⁹ Consistent with this view, possession of art is not like owning a widget, even after a work is sold it remains under the influence of its creator.²⁰

The United States, however, follows the more traditional view of property rights -- that the purchaser of an item for a freely negotiated price

¹⁶ Bolch, Damon and Hinshaw, supra note 3, at 695.

¹⁷ See Comment 14, at 100 (participants in art market accustomed to incurring charges on sale of art, and a number of collectors are art lovers who purchase for more than economic gain).

¹⁸ Paul Sherman, Incorporation of the Droit de Suite into United States Copyright Law, 18 Copyright L. Symp. (ASCAP) 51 (1968).

¹⁹ However, even under French property and contract law, the alienation of chattel without any reservation results in a complete and total divestment of all the seller's interests. Thus, if an artist sold a work without reserving any rights, but for moral rights, he would be stripped of any claims to it. Through moral rights, however, a creator may control and even suppress the use of his product, even though he no longer owns it. The principle is in complete derogation of the concept of exclusive ownership, and, in fact, in France, exclusive and total ownership of intellectual property, other than by the creator, is not possible. Hauser, supra note 13, at 103.

²⁰ See Fawcett, supra note 1, at 16-17. Although, at least one artist implicitly conceded, in the context of arguing that artists should not have to share any loss if they receive the benefit of the resale royalty, that art is like a commodity -- a stock or an automobile, for example -- and that one should not expect to be reimbursed for a depreciation in value. New York Hearing at 76-77 (statement of Hans Haacke). The analogy is perhaps not apt since an art owner possesses his work subject to the potential to pay a royalty someday, yet the stock or automobile owner has no such encumbrance.

is the absolute owner -- and is less receptive generally to restraints on free alienability. And, indeed, the lack of alienability in the droit de suite is the most substantial restriction of the owner's rights: the transferee may receive and assign any or all of the author's exclusive rights that he has acquired in a work, but he is barred from obtaining the resale royalty.²¹

The royalty also raises significant privacy concerns in that artists would need to obtain certain information about sales prices and ownership that sellers, purchasers, and other owners may not want to disclose.²²

Moreover, the comparison of the relative protection and remuneration of artists and other creators is extremely difficult to establish. Although authors who do not create unique works are rewarded by royalties and can produce numerous copies and reap the benefits, the value of works of art is determined by scarcity and works of fine art do not require the same level of demand to secure a living for the artist.²³ In this way, even though some fine artists cannot avail themselves of reproduction rights,²⁴ it may be argued nevertheless that the copyright scheme, in fact, favors these artists.²⁵

²¹ See Berne Convention, Article 14ter (1); see generally Fawcett, supra note 1, at 34.

²² New York Hearing at 198-199 (statement of John Koegel), App. Part III.

²³ Weil, supra note 2, at 2.

²⁴ A major economic argument for the resale royalty is the relative inability of fine artists to exploit the reproduction right. Artists may not be using all available media for the exploitation of their works, e.g. posters, cards, prints, shirts, rugs, art books.

²⁵ See id. Authors also receive their royalties over time, while artists get a lump sum that can be invested and receive interest. Monroe E. Price, Government Policy and Economic Security for Artists: The Case of the Droit de Suite, 77 Yale L.J. 1333, 1346 (1968). Moreover, having more recognizable objects to manipulate, artists are favored under the tax code, since they are
(continued...)

Additionally, successful artists -- and those are the primary ones that copyright and droit de suite ²⁶ reward -- secure ever increasing prices as their reputations grow and they sell successive works. ²⁷ In this way, in fact, they continue to maintain a connection with their body of work, even after sale, undercutting one of the primary arguments supporting the resale royalty.

Most importantly, it is not clear that the analogy holds between the sale of works subject to continuing royalties and the sale of works of visual art. First, the former are sold in thousands of copies to large groups of customers, and until the last copy is sold, the author, entitled to remuneration for all copies, does not know the total revenue from the work; works of fine arts, on the other hand, are sold to one or a limited number of customers and the creator can control the distribution of his works and has all, or virtually all, of this information at the time of sale. ²⁸ Second, the triggering event for

²⁵(...continued)

better able to arrange expenses and charitable deductions to minimize income taxes. Id. at 1347.

Although the copyright law is technically a statutory recognition of proprietary rights in intellectual property, it also reflects the economic realities of how works are exploited in the market. Given a painter or sculptor, and an author or composer of comparable stature, the former will receive greater remuneration for each original or limited edition painting or sculpture that they sell than will the latter for each book or sound recording sold. Authors and composers must therefore sell more copies of their works than painters and sculptors to receive equal remuneration. Thus, from a purely economic perspective, the copyright protection extended to fine artists is more favorable, or at least equal to, that given to authors and composers.

²⁶ New York Hearing at 201-02 (statement of John Koegel)(resale royalties, like copyright, reward only successful creativity), App. Part III.

²⁷ Lewis D. Solomon and Linda V. Gill, Federal and State Resale Royalty Legislation: "What Hath Art Wrought?", 26 U.C.L.A. L.Rev. 322, 331 (1978); Comment 11, at 11. For a comparison between artist social security, which provides financial assistance to young creators generally, and droit de suite, which by its terms is a personal right of visual artists and benefits only successful creators, see Katzenberger, supra note 2, at 370-71.

²⁸ Comment 11, at 7-8.

the resale royalty is the substitution of one owner for another, rather than the distribution of another example of the original work, as is the case with works created in many copies.²⁹ A more apt comparison perhaps would be the resale of a first-edition book, for which authors are not paid a royalty.³⁰

Assuming that the Copyright Act has a detrimental impact on fine artists as compared to other creators, it is not clear that the use of resale royalties is the best means by which to level the playing field. Arguments have been made that the presence of resale royalties has had an adverse effect on the primary markets for contemporary art in California and France, although there is strong disagreement about this point.³¹

The droit de suite also depends on frequent resale, making the right less valuable to the artist if his or her art does not change hands within a relatively short period.³² Moreover, an artist whose work is resold frequently may gain more than one whose work has appreciated more but is only resold once.³³

²⁹ Weil, supra note 2, at 2.

³⁰ See New York Hearing at 24-25 (statement of Stefan Andersson)(authors are not paid for resale of first edition books). However, the Berne Convention contemplates that writers and composers will receive resale royalties for original manuscripts. Article 14~~ter~~ (1), App. Part III.

³¹ Comment 11, at 13-14 (ADAA); The president of the Art Dealers Association of America also maintains that England, not having as strong an economy as France -- but also lacking the resale royalty -- has a healthy art market. Id. at 14. But see Comment 15, at 4 (Goetzl)(California art market thriving despite royalty); Comment 14, at 5 (VLA)(French art market has thrived). Cf. Comment 16, at 1 (ADAGP)(auction houses in countries without a royalty -- England, Switzerland and Netherlands -- do not have higher turnover than France or Germany, where right exists), App. Part I.

³² Bild-Kunst, the artist's rights collection society in the Federal Republic of Germany, acknowledges, in fact, that it is doubtful that the royalty will help most living artists, since their works will not be resold during their lives. Comment 17, at 1.

³³ New York Hearing at 220 (statement of Steven Weil), App. Part III.

Moreover, since most artists do not have a resale market, they may suffer if purchasers pay less in the primary market, factoring in the future royalty.³⁴ Additionally, the right is best administered when applied to public sales, like auctions, and most works are not sold in this manner.³⁵ And even when the right is applied to dealer and private sales, it is difficult to administer and the costs may outweigh the benefits of the system.³⁶ Finally, galleries spend equal amounts promoting their artists, experienced or not. But the works of young artists are not immediately profitable and need to be subsidized by more successful, established artists. For smaller galleries particularly, the resale royalty could reduce the number of unprofitable exhibitions of inexperienced artists.³⁷

As a matter of policy, does Congress want to help struggling artists or provide an economic right that may simply reward only commercially successful creators whose work is frequently resold? A considerable body of literature concludes that the royalty favors those who are already established and does not aid the plight of those without a market for their works.³⁸ And are the

³⁴ See San Francisco Hearing at 31 (statement of Professor John H. Merryman).

³⁵ See 69 Australian Copyright Council (1989).

³⁶ *Id.* at 13.

³⁷ Comment 11, at 72 (ADAA), App. Part I. See San Francisco Hearing at 31-32 (statement of Professor John H. Merryman)(dealers will be forced to have fewer shows of unrecognized artists and purchase and resell works of only famous artists), App. Part II.

³⁸ See, e.g., Fawcett, *supra* note 1, at 144; New York Hearing, at 198 (statement of John Koegel), App. Part III; Weil, *supra* note 2, at 5; Bolch, Damon and Hinshaw, *supra* note 3, at 692, 695. Cf. Tom R. Camp, *Art Resale Rights and the Art Resale Market: An Empirical Study*, 28 Bull. Copyright Soc. 146, 158-59 (1980)(resale right would have deleterious effect for purchasers for which price is important factor).

benefits of the resale royalty worth the concomitant costs: for example, that Congress would have to make inherent value judgments about why people should buy art -- whether for consumption or investment -- and reward the true connoisseur who does not contemplate reselling his work? ³⁹

The resale royalty also encourages the creation of particular types of art. ⁴⁰ To be truly effective the droit de suite must be an incentive to produce works that are resold frequently: ⁴¹ easel paintings and traditional sculpture, for example, where conception is embodied in a single object. ⁴²

Finally, does Congress want to eliminate, or even qualify, the First Sale doctrine, and abandon well-settled principles of free alienability in Anglo-American property jurisprudence? ⁴³

Several arguments, largely equitable, are advanced in support of the droit de suite. Since the original buyer, possessing artistic taste and courage, gambles his money on a work without market value, he should benefit from any

³⁹ In value-neutral economic terms, people buy art either as a pure consumption good, with no resale foreseen, to enjoy the nonmonetary benefits from ownership; or, they buy at least partly for investment.

Indeed, contemporary art may be a bad financial investment. Unlike stock, which has tax deductible losses and costs of ownership, and a sales commission of only one percent, the costs of selling a piece of art are often 15 to 25 percent of the purchase price, plus the intermediate costs of insurance, conservation and shipping -- none of which are deductible. The disparity is particularly great where royalties are calculated based on gross proceeds, since tax is keyed to profit alone. S. Weil, supra note 2, at 4.

⁴⁰ Price, supra note 24, at 1338.

⁴¹ Id. at n. 15.

⁴² Id. at 1339 n.16.

⁴³ See New York Hearing at 7 (statement of Jean-Marc Gutton)(contrasts resale royalty with notion of copyright as pecuniary right over commercial product for which artist retains no right), App. Part III; Schulder, supra note 13, at 28 (concept of individual purchaser having to share ownership with other inconsistent with U.S. property law).

increased value. But when a later purchaser is a businessman without any artistic taste who wants a good business deal by buying an article with recognized high value, it is fairer to give any increase to the artist or his heirs.⁴⁴

In France, the seller pays for the privilege of having enjoyed a work of art during the time he had it. Much like the author who receives royalties, the artist participates in the continuing exploitation of his works. Under French law, the artist shares in the total sales price of a work.⁴⁵

This approach, however, does not account for the low profit margin on art sales, and the seller's costs and dealer commission.⁴⁶ There is something inherently unjust, as well, in permitting an artist to benefit from increases, without also having to share the risk of loss.⁴⁷

In Germany, the artist's royalty is premised on the belief that the increased value of a work was always latent in it, and due to the artist's continuing work. The increase in value is what the artist should have received

⁴⁴ François Hepp, Royalties From Works Of The Fine Arts: Origin Of The Concept Of Droit De Suite In Copyright Law, 6. Bull. Copyright Soc. 91, 92-93 (1959). A shortcoming of this theory, however, is that it is the seller (the original purchaser of taste and courage) and not the new purchaser who pays the resale royalty.

⁴⁵ Supra note 35, at 11.

⁴⁶ Solomon and Gill, supra note 26, at 341. Stephen Weil estimates, for example, that a \$10,000 painting would require 20 percent average expense for maintenance. If the gross sales proceeds are coupled with a five percent resale royalty, the break even point for the sale would be at 133 percent of the purchase price. Weil, supra note 2, at 4. Thus, royalties encourage the retention of works for long periods -- or at least long enough to amortize the costs of ownership and sale -- rather than the injection of new money into the contemporary art market.

⁴⁷ Fawcett, supra note 1, at 11.

originally.⁴⁸ From the German perspective, artists are exploited because the true value of art is not realized until many years after the original sale, and the creators do not share in any appreciation in value. Since art is often in the avant-garde,⁴⁹ artists should not be punished for their prescience.

In pure economic terms, however, the value of an object is what a willing buyer will pay a willing seller at a given time.⁵⁰ Thus, when a young artist without a recognized market sells a work to a collector -- who assumes the considerable risk that the work may decline in value -- market forces dictate the price and terms of the exchange. And consistent with our concepts of property rights, the collector receives the interests he negotiated in the work as a quid pro quo for his gamble.

There are other flaws, as well, with the intrinsic value supposition. First, there is nothing inherent in the concept of art which furnishes artists with particular privileges. The relationship between the artist and his work is largely driven by cultural interests, and whether a work is valued, in itself,

⁴⁸ Id. Cf. San Francisco Hearing at 47 (statement of Richard Mayer)(worth implicit in work of art lies in artist's development over years of production, not with object sold). This concept is a variation on the economic doctrine of "just price," that things have an objective, intrinsic value, in and of themselves, App. Part II. Bolch, Damon, and Hinshaw, supra note 3, at 690.

⁴⁹ As one author noted:

Works of the fine arts have an economic value which varies considerably, according to the tastes of the public, fashion, and the evolution of artistic views. The greatest masterpieces of art have generally not been recognized at the time they were created.

Hepp, supra note 43, at 92. See also New York Hearing at 161 (statement of Sanford Hirsch)(fashion is key factor in art market), App. Part II.

⁵⁰ New York Hearing at 215 (statement of Stephen Weil), App. Part III.

is a matter that varies from time to time and society to society.⁵¹

Second, factors other than the continuing efforts of the artist raise the value of a work. These include the premature death of the artist, his failure to live up to earlier promise, and any reduction in supply of an artist's work or inclusion in a well-known collection, as well as inflation in the art market generally.⁵² The price of art, like other commodities, varies with supply and demand, and the artist is only one of the many factors that impact price.⁵³

Third, it is an economic reality that most art depreciates in value, so a royalty based on profit will not benefit most artists.⁵⁴ And as a matter of fairness, it is difficult to ignore devaluation of currencies and conservation costs.

Fourth, the intrinsic value concept relies on the attenuated connection between artists and subsequent and unknown sellers, so that purchasers end up with a share of the artist's fame, and not a piece of art.⁵⁵

⁵¹ Price, supra note 41, at 1336 n.13.

⁵² One royalty advocate, acknowledged, in fact, that if royalties are paid on the gross sales price, there is no need to adjust for inflation because the royalty will have been paid in inflated currency. Comment 14, at 105-106.

⁵³ New York Hearing at 209-10 (statement of Stephen Weil), App. Part III. Indeed, Weil maintains that even if the artist's continuing efforts are the principal basis for the increased value, the artist still should not be entitled to a share of the increase. If a house's sales price increases because a developer builds a golf course nearby or the architect later becomes famous, Weil argues, neither the developer nor the architect is entitled to a share of the proceeds. Id. at 210.

⁵⁴ Solomon and Gill, supra note 26, at 341.

⁵⁵ Fawcett, supra note 1, at 16, n. 70.

Finally, the complexity of calculations make a royalty based on appreciation difficult to implement.⁵⁶

In Belgium, the contract principles of changed circumstances and unjust enrichment underlie the royalty right. There is a continuing relationship between the artist and those who purchase his work, and, it is believed, a seller should not benefit unjustly from any increased value in an artist's work.⁵⁷ This approach presupposes that value increases are not the result of any specific activity or ability of the owner of a work, so that he should not benefit at the creator's expense.⁵⁸

The Belgian and intrinsic value theories, however, share many of the same problems. Initially, the putative enrichment is based on a contract between a willing seller and buyer that was legitimate at the time of the transaction. No injury has been caused when the purchaser pays the artist a modest sum to buy a work; it is only later when the work increases in value -- whether through the artist's additional efforts or not -- that the price becomes insufficient.⁵⁹

⁵⁶ Id. at 13. See New York Hearing at 101-02 (statement of Ted Feder)(experience not successful in Italy, Portugal, Uruguay, Czechoslovakia and California, where royalty applied to increase in value over preceding sale), App. Part III; Comment 13, at 91 (gross revenue calculation avoids confusion from trying to base percentage on seller's profit), App. Part I. But see New York Hearing, at 220 (statement of Stephen Weil)(easier to track royalty based on appreciation because necessary information must be reported for income tax purposes), App. Part III.

⁵⁷ Supra note 1, at 14.

⁵⁸ Id. at 13.

⁵⁹ Id. at 14-15.

And for unjust enrichment to be truly equitable, the seller would be permitted to deduct the cost of resale and the expenses of ownership.⁶⁰

Regardless of whether the resale royalty is based on the entire sales price or merely the increase in value of the art work, there are consequences to the integration of the royalty into the free market system. Some argue that the royalty encumbers future sales and depresses the art market. And to the extent that works of visual art can be substituted readily by another commodity, patterns of demand are altered and prices and sales volume are reduced.⁶¹

Further, art that is easily reproducible, ephemeral or of monumental scale, will probably not be resold within the life plus fifty year period.⁶²

Moreover, although almost all works of living artists decline in value, purchasers may not deduct these losses on their taxes, even though any profit is fully taxable.⁶³ Seen in these terms, the royalty is a deterrent and not an incentive for the collection of modern art, and the money for

⁶⁰ Collectors pay for framing, conservation, storage, time-use of capital and absorb any loss on resale. Under this scenario, it is argued, the only plausible economic basis for a resale royalty would be if there were no ownership costs and art always increased in value. New York Hearing at 217 (statement of Stephen Weil), App. Part III. Moreover, contemporary art is the most difficult to sell, and in addition to all the costs of conservation and maintenance, the seller must also pay a 15-20 percent dealer commission, and capital gains tax. New York Hearing at 256, 261-62 (statement of Gilbert Edelson), App. Part III. For auction sales in England and the United States, transaction costs are split between the seller and buyer, 10 percent each. New York Hearing at 260-61 (statement of Mitchell Zuckerman).

⁶¹ Comment 11, at 69.

⁶² Price, *supra* note 24, at 1341-42. But see Katzenberger, *supra* note 2, at 371-72 (inapplicability of *droit de suite* in certain circumstances does not invalidate right since it is only one of several exploitation rights which in totality protect author).

⁶³ New York Hearing at 229 (statement of Gilbert Edelson), App. Part III. One commentator suggested that royalties should be deductible from capital gains or losses at resale, and be considered ordinary income to the artist. Comment 18, at 212.

administration of the right may come from collectors who would otherwise have used the money to acquire art. ⁶⁴

Finally, society's perception of the role of artists is also crucial to the integration of a resale royalty into our economic and legal systems. The notion of starving artists being exploited by wealthy, savvy investors does not do justice to reality. Rather, it might be that, as Monroe Price argued forcefully a quarter of a century ago, droit de suite is based on romantic nostalgia. ⁶⁵ Price warned that the starving artist perception can have perverse effects as the basis for public policy, if the government concentrates on the perceived inequity of the lag time between artistic creation and market acceptance, and droit de suite becomes the penance that society does. ⁶⁶

Some convincing arguments were made that artists earn no less than other workers of similar training and personal characteristics. ⁶⁷ Like participants in a lottery, some individuals are attracted to high-risk careers

⁶⁴ New York Hearing at 231-32 (statement of Gilbert Edelson), App. Part III.

⁶⁵ Price wrote:

The droit de suite springs from a nostalgic recollection of the late nineteenth century. It is a case, not unusual, of legislation passed or posed to correct a situation that no longer exists with the intensity that provoked reform.

Price, supra note 24, at 1335.

⁶⁶ Id. at 1336.

⁶⁷ Randall K. Filer, The "Starving Artist" - Myth or Reality? Earnings of Artists in the United States, 94 J. of Pol. Econ. 56 (1986). However, the vice president of National Artists Equity stated at the New York hearing, that artists work less in their professions than do accountants, for example, and that accountants will make more money. New York Hearing at 169-70 (statement of George Koch), App. Part III.

in the arts for the possibility of an eventual large payoff or the significant nonmonetary rewards of creation, and are willing to sacrifice consumer goods for other advantages. ⁶⁸ Additionally, fewer artists leave their professions than do workers in other occupations. ⁶⁹

And just as artists voluntarily enter their profession, it may be argued that they are similarly not exploited when they enter into a transaction with a wealthy buyer. ⁷⁰ The artist is faced with a choice of whether to sell his work today, or to hold the art as an investment for a certain time period. A sale will take place if the artist has a greater present need for consumption than the buyer. And although both the artist and the buyer agree on the future price of a work, they differ in their preference for present relative to future consumption. ⁷¹

⁶⁸ Id. at 57. For example, artists work a substantially lower average number of hours, id. at 61, and have more rapid earnings growth than other workers, id. at 72, and, over the age of 40, earn more than nonartists. Id. at 63.

⁶⁹ Id. at 59.

⁷⁰ Bolch, Damon and Hinshaw, supra note , at 693.

⁷¹ Id. at 692-93. As a practical matter, though, an artist needs money for food and shelter, as well as the costs associated with the preparation of his work, and may not have any choice about selling his work for present consumption. See San Francisco Hearing at 48 (statement of Eleanor Dickinson)(producing art is very expensive and present income is needed to continue production), App. Part II; New York Hearing at 161-62 (statement of Sanford Hirsch)(artists bear cost of development and many of dealer's overhead costs for crating, transportation, framing and advertising), App. Part III.

However, Willem de Kooning's perspective, that collectors who benefitted from increases in the value of his works helped him to continue painting by paying for art materials, food and rent, is probably a more realistic appraisal of the choice of entering the art profession. See New York Hearing at 237-38 (statement of Gilbert Edelson), App. Part III.

V. CONCLUSIONS AND RECOMMENDATIONS

A. PRINCIPAL CONCLUSIONS

Copyright legislation in the United States is grounded in the constitutional clause, which motivates creativity, while encouraging the broad public dissemination of works. Thus, whether resale royalties are moral or author's rights, the constitutional framework provides a logical matrix for balancing creator and user interests. Consistent with the constitutional purpose of encouraging creativity, it may be argued that the potential for increased remuneration is a potent incentive for further creation. Yet it is equally plausible that the royalty may be too far removed from the action of creation to provide any motivation. Any increase in creativity, however, must be balanced against the possible real-life economic consequences of decreased art prices in the primary market -- the possible direct consequence of the later royalty payment -- which will not help an already damaged contemporary art market. Further, increased sales charges will arguably discourage collectors from risking the purchase of contemporary art, inhibiting its dissemination. Yet when all is said and done, the art market may absorb royalty costs, like other costs associated with art transactions, without a ripple.

The European concept of droit de suite derives from the moral right of paternity, connecting authors with their creative progeny, even after alienation of the works. From this perspective, artists benefit as a matter of equity, not welfare, from increases in the value of their fine art. Such increases, it is believed, are based on the artist's continued work, and purchasers should not be unjustly enriched through the artist's continued evolution.

Works created in numerous copies are commercially exploited by the indirect communication of a copy to the public, through either reproduction or performance. A critical value of fine art lies in its uniqueness. Thus, some argue that the U.S. copyright law, which is driven typically by economic exploitation of many copies, has failed to provide economic incentives for fine visual artists who create works in unique or limited copies. Visual artists are paid only for the initial sale of their works and have limited markets for the exploitation of their reproduction rights. Because of the First Sale doctrine, they also lose their potentially most remunerative right -- that of public display -- once they sell their creations. Reasoning that other authors have an easier time exploiting their works through copyright, advocates justify the resale royalty as the artist's compensation for the lack of a marketable reproduction right, rewarding exploitation by the direct communication of the very object.

Based on our examination of the written comments and the hearing record, and our independent research, the Copyright Office is not persuaded that there are legitimate economic interests of visual artists that would be helped by a resale royalty. Although authors who do not create unique works can produce numerous copies or license numerous performances and reap the benefits of continued royalties, the value of works of fine art is determined by scarcity. Visual art works do not require the same level of demand as printed works, for example, to secure a living for the artist. Indeed, in this respect, even though fine artists cannot avail themselves optimally of reproduction rights, it may be argued nevertheless that the copyright scheme favors such artists who have fewer works to market.

Moreover, successful artists -- who will typically garner more income from droit de suite -- secure ever increasing prices as their reputations grow and they sell successive works. Thus, they do continue to maintain a connection with their body of work, albeit not the specific work resold, even after sale, undercutting one of the primary arguments supporting the royalty.

It is not clear that the copyright analogy holds between the sale of works subject to continuing royalties and the sale of works of visual art. A book, for example, is sold in thousands of copies to large groups of customers and the creator cannot control the distribution and acquire all the information about the work's revenue until the last copy is sold. A sculpture, on the other hand, is sold to one or a limited number of customers and the creator can control the distribution of the work and has all, or virtually all, this information at the time of the sale. Moreover, the triggering event for the resale royalty is the substitution of one owner for another, rather than the distribution of another example of the original work, as is the case with works created in many copies. While the event of resale is a convenient touchstone for triggering payment to the artist, it is not clear that it is actually a new exploitation of the work. A more apt comparison between books and sculptures would be the resale of a first-edition book, for which authors are typically not paid a royalty.

Undoubtedly the enhanced reputation of a creator has a positive effect on future sale prices for every kind of authorship. While there has been some legal effort through droit de suite and consideration of "best seller" reformation of contract provisions in a few countries, to even out disparities when a work appreciates a great deal after the initial sale, it is not clear how successful these efforts have been.

Because the Copyright Office lacks sufficient current empirical data about several important facts, which the administrative hearing process and scholarly research have not supplied, we cannot accurately compare the respective remuneration of authors who create in many, and artists who create in limited, or unique, copies. Any conclusions that we could make about the number of artists who would benefit from the resale royalty must be based, therefore, on anecdotal evidence and limited sample size. Most significantly, there is no clear evidence indicating the frequency of resale of works of fine art. Thus, even if Congress determines that the Copyright Act does treat fine visual artists in a manner less favorable than authors or composers, it is not clear that the resale royalty right is the best means to offset this disadvantage, particularly if it is not triggered with any frequency within the copyright term. There is evidence that as few as one percent of artists will qualify for the royalty.

Lacking hard numbers and quantifiable experience to determine empirically that the royalty is a viable option for U.S. artists, it is helpful to look to existing royalty systems in other countries as a frame of reference. In France, for example, where the concept originated and the country has had three-quarters of a century to iron out difficulties in the administration of the right, application of the droit de suite has led to some criticism. The royalty is applied to the total sales price of a work of art, departing from the rationale of permitting artists to participate in increases in the value of their creations. Applying the royalty to the total sales price of a work is particularly unfair when the work decreases in value, since in addition to the collector's loss on the transaction, he or she must also pay the associated costs of art ownership.

The droit de suite in France has been applied only to auction houses -- presumably because they are easier to monitor -- even though, in theory, the right is equally applicable to dealer and private sales. Dealer sales are, in fact, covered by the 1957 law, but no implementing rules have ever been issued. Estimates for the percentage of sales in galleries as compared to those in auction houses ranged from 60% art dealers to 40% auction to an estimate that there are four times as many sales through galleries and private transactions as through the auction market. Thus, a large number of resales of contemporary art are not subject to the droit de suite. Both France and Germany have established agreements with art galleries to make social security payments for artists even though artists are not employees of art galleries.

That there are more sales through dealers and private parties than auction houses is probably also the case in the United States. At large houses like Christies and Sotheby's there is a sales minimum that may vary depending on the kind of work involved. Combined with a large sales commission, this would tend to restrict auction sales to valuable works. If the right is applied to dealer and private sales, it is difficult to administer and the costs may outweigh the benefits of the system, particularly if, as in California, the artist must enforce his own royalty rights.

The German approach to the resale royalty reasons that the increased value of a work was always latent in it and is due to the artist's continuing work. When a new artist sells a work to a collector -- who assumes the considerable risk that the work may decline in value -- market forces, however, dictate the price and terms of the exchange. In a free market, there is arguably no latent value of an object, rather it is only as valuable as the price a willing buyer will pay a willing seller at a given time. Additionally, there are

factors other than the continuing efforts of the artist that raise the value of a work. These include the premature death of the artist, his or her failure to live up to earlier promise, any reduction in the supply of his or her work or the inclusion in a well-known collection, or inflation in the art market generally. On the other hand, since most art depreciates in value, a royalty based on profit will benefit few artists.

Purchasers may not ordinarily deduct any losses on their taxes, even though all profit is fully taxable. In this way, the royalty discourages, rather than encourages, the collection of modern art. Some of the European countries do offer tax incentives including reduction of the (VAT) value added tax.

While basing the resale royalty on the gross resale price may seem less equitable, the complexity of calculations make a royalty based on appreciation difficult to implement. Countries such as Italy that base the royalty on appreciation have encountered enforcement problems.

The Belgian approach, based on the contract principles of changed circumstances and unjust enrichment, and the intrinsic value theory shares many of the same shortcomings as the French or German approaches. The putative enrichment is based on a contract between a willing seller and buyer that was legitimate at the time of the transaction. No injury was caused when the purchaser paid a modest sum to buy a work, it is only later when the work increases in value that the price becomes insufficient. For unjust enrichment to be truly equitable, the seller would have to be permitted to deduct the costs of resale and ownership.

Additionally, the resale royalty concept fits awkwardly within a free market economy. Although several European authorities maintain that the royalty has not adversely affected their art markets, others maintain that the presence

of the royalty has hindered several European art markets. It is not clear what conclusions can be drawn from the California experience. Again evidence is inconsistent about the extent to which the resale royalty right has affected sale of contemporary art in California, and the number of sham sales that have shifted to other jurisdictions. On the other hand, it is clear that the California resale right has not been fully realized.

The argument is also made that the royalty benefits only successful, well-established artists, and that most artists, who lack a resale market, will suffer in the primary market as prices are depressed, anticipating the future royalty payment.

The usefulness of the royalty depends, as well, on the creation of the type of art that Congress wants to encourage. To be effective the droit de suite must be an incentive to produce works that will be resold -- ideally, easel paintings and traditional sculpture, where conception is embodied in a single object, or a very few copies.

Implementation of the royalty would require qualification of the First Sale doctrine. The copyright law recognizes a distinction between a work and its material embodiment. This separation largely disappears, however, when a work is created in unique form. Once a collector has purchased an original painting, for example, the artist no longer possesses either the work or the object to display, whether or not he or she has retained the copyright. And even if the artist creates several copies of a work, he or she must compete with the copy owner's right of public display.

Finally, the resale royalty raises significant privacy concerns since artists would need to obtain information about sales prices and ownership that sellers, purchasers and other owners may not want to disclose.

In summary, based on its analysis of the foreign and California experience with droit de suite, the administrative record of the hearings and written comments, and independent research, the Copyright Office is not persuaded that sufficient economic and copyright policy justification exists to establish droit de suite in the United States. The international community is now focusing on improving artists' rights, including the possibility of harmonization of droit de suite within the European Community. Should the European Community harmonize existing droit de suite laws, Congress may want to take another look at the resale royalty, particularly if the Community decides to extend the royalty to all its member States.

Many countries offer alternative solutions that the United States might want to consider. Although the Copyright Office does not necessarily endorse alternative solutions, in the next section of our Conclusions and Recommendations we briefly consider possible alternatives to droit de suite. In the event Congress should determine that the time is ripe for introduction of droit de suite in the United States, the Copyright Office has prepared a possible model of a droit de suite system. This model should facilitate establishment of a system with a better chance of achieving the objective of assistance to artists without significant damage to the art market.

B. SUGGESTED ALTERNATIVES

1. Broader Public Display Right

Assuming that fine visual artists cannot exploit their intellectual property rights adequately under the existing copyright law, some form of a broadened public display right might be an alternative. Rather than depending on frequent resales within the specified royalty term, a considerable problem of the droit de suite, the display right would be triggered by the typical manner

of exploitation of works of fine art -- public display. Museums and public art galleries might pay a fee to display works of art publicly.

In theory, section 106(5) of the Copyright Act already provides creators of pictorial, graphic, and sculptural works with a public display right. However, the right is cut off by the First Sale doctrine in section 109(c), that permits the owner of a copy to display his or her work publicly to viewers present at the place where the copy is located. Thus, with the sale of a unique work, the copyright owner is left with nothing to display, and with works created in limited copies the creator and object owner may mount competing displays.

2. Commercial Rental Right

Under existing law, if a work of art is alienated, solely by rental, the artist retains the exclusive distribution right. However, very few artists have the market power to structure the art transactions so that works are rented and ownership of the copy of the work does not pass to the purchaser.

Even with works that are sold, the Copyright Act could be amended to allow the distribution right to survive with respect to commercial rental. The owner of the copy would receive the object, while the artist would retain the right to exploit the work by commercial rental. Thus, the owner of the copy would pay the artist a royalty for any commercial rental of the purchased work.

3. Compulsory Licensing

Another way to balance the interests of artists and collectors would be through some form of compulsory licensing and modification of section 109. On the payment to an artist of the purchase price for a work and a licensing fee for public display, the owner of a copy would be free to display the work without having to negotiate terms with the artist.

4. Federal Grants and Art in Federal Buildings

Congress could also encourage artists by increasing federal grants or by increased funding for the purchase of artworks for federal buildings.

C. MODEL DROIT DE SUITE SYSTEM

Should Congress determine that federal droit de suite legislation is the best way to help artists, the Copyright Office suggests consideration for the following model system.

1. Oversight of the Droit de Suite: Collection and Enforcement

The Copyright Office suggests the Congress consider collective management of the droit de suite through a private authors' rights collecting society. The collection of art resale royalties would be handled on a direct or contractual basis, similar to collection of musical performance royalties by ASCAP and BMI.

The droit de suite has been effectively implemented only in those countries with active and efficient national authors' societies, such as SPADEM in France and Bild-Kunst in Germany. In the United States, the Artists' Rights Society (ARS) or the Visual Artists and Galleries Association, Inc. (VAGA), would be equipped to handle the practical collection of the droit de suite, since these organizations already have an effective collection and distribution system for reproduction rights. The royalty is collected by the society, which takes a percentage for administrative costs and distributes the remainder to the artist.

Individual management, as seen in California, places a nearly insurmountable burden on the artist to obtain information and to assert claims, often against valued clients or gallery owners. Likewise, the bureaucratic approach has proven far less successful than collective, private management.

The Office could serve a record-keeping function similar to the arts registry proposed in the Kennedy-Markey bills. Copyright Office records would be available to the artists' rights societies for purposes of collection, enforcement, and distribution. If a resale royalty were adopted in the United States, and particularly if it were extended to include dealer sales, the Office anticipates that a collection system with elements similar to the French or German systems would have the best chance of success.

2. Types of Sales

The Copyright Office suggests that, if a resale royalty is enacted in the United States, it should apply initially only to public auction sales. Auction sales are easiest to monitor. Including dealer sales -- or even private sales, as proposed in the Waxman and Kennedy-Markey bills -- increases the administrative and enforcement challenge.

The resale royalty could apply initially to auction houses and then in about five years, Congress could determine whether it should be extended.

The French law originally applied only to sales at auction, and Belgium has preserved this limitation. In 1957, France extended its law to sales "through a dealer" but implementing rules were never issued and the law still applies in practice only to auction. The French galleries do, however, make payments to an artists' social security. The German law requires a royalty on both auction and dealer sales, but in reality, Bild-Kunst collects a flat percentage of gallery revenue paid partly to artists qualifying for droit de suite and partly to an artists' social security fund.

As the collection mechanism matures, the artists' societies such as VAGA and ARS could develop a system to collect art resale royalties from galleries in this country that might be similar to the collection of performance

royalties from radio stations by ASCAP, BMI and SESAC. Further, if the European Community adopts a position including dealers within a droit de suite requirement, that might be a justification for extending coverage to dealers in this country.

3. Measuring the Royalty

Based on the California and European experiences, a flat royalty of between three and five percent on the total gross sales price of the work seems more appropriate. There would be no need initially to set a threshold price to trigger the royalty mechanism if the royalty were applied initially only to auction sales, because auction sales usually deal in works with a minimum floor price. Similarly, there may be no practical need to legislate a floor price for dealer sales: Although one arts organization recommended a threshold resale price of as high as \$5000 to trigger the droit de suite, and Kennedy-Markey called for a threshold of \$1000, other groups called for figures as low as \$250 or \$500. Again, most art dealers trade only in works of at least that value, particularly in the resale market.

In those countries that have most successfully implemented the droit de suite, including France, Germany and Belgium, the resale royalty is measured on the total resale price. Measuring the royalty by the resale price departs from the rationale of allowing artists to participate in an increase in value, but is considered simpler and more practical. The difficulty in administering a royalty based on the difference between the purchase price and resale price may explain the law's disuse in countries such as Italy and Czechoslovakia.

Any resale royalty legislation could contain a rebuttable presumption that a work has increased in value between the time of purchase and resale. The

purchaser/reseller would have the burden of proving to the collecting society that a work has not appreciated in value and therefore a royalty is not due.

4. Term

A term for the droit de suite coextensive with copyright seems appropriate. Under the current copyright law, this is life of the author plus 50 years. Should the European Community adopt a term for the droit de suite of life plus 70 years, there would be justification for similarly extending the term here.

The droit de suite would be descendible in a manner analogous to copyright.

5. Foreign Artists

The resale royalty would be applied to foreign artists on the basis of reciprocity. This is consistent with the Berne Convention and the general consensus.

6. Alienability

The Berne Convention recognizes an inalienable right to the resale royalty. The Office concludes that if a resale royalty is enacted in the United States it should be inalienable, but transferrable for purposes of assigning collection rights. The Office also suggests that the droit de suite be non-waivable. However, this latter suggestion may be subject to the ultimate resolution of the waivability of moral rights in the United States.

7. Types of Works

The Copyright Office suggests that any droit de suite legislation apply to works of visual art as defined in 17 U.S.C. §101 and in the Visual Artists Rights Act of 1990, with the following exception: For works in limited edition, the Copyright Office would suggest that the statute should fix the

number of copies to which the resale royalty would apply at 10 or fewer. In France, for example, the royalty applies to eight copies of a limited edition sculptural work, which must be numbered, signed, and executed or controlled (e.g., cast) by the artist.

8. Retroactivity

The Office suggests that, if Congress adopts a droit de suite, it should make the law prospective only, i.e., effective only as to the resale of eligible works created on or after the date the law becomes effective.

TABLE 1

COUNTRY	WORKS	DURATION	BENEFICIARIES AFTER DEATH	TYPES OF SALE	BASIS FOR DETERMINATION	PERCENTAGE	MINIMUM	TOTAL COLLECTION
FRANCE	Graphic and plastic work	Same as for other economic rights of authors	Spouse for the usufruct, heirs, excluding legatees or transferees	Sales at auction or by a dealer	Sales price	3%	100 FF (1963 "new" francs)	Approximately \$14.5 million US in 1990
GERMANY, FEDERAL REPUBLIC OF	Works of (figurative) art	Same as for other economic rights of authors	Heirs and legatees	Sales at auction or by a dealer	Sales price	5%	100 DM	Approximately \$3.6 million US in 1990
BELGIUM	Works such as paintings, sculpture, drawings, engravings	Same as for other economic rights of authors	Heirs and assignees	Sales at auction	Sales price	2-6%	1,000BF	Approximately \$144,000 US in 1990
ITALY	Works of (figurative) art in the form of paintings, sculpture, drawings, prints and manuscripts	Same as for other economic rights of authors	Legatees, Absent Testamentary provisions, spouse and legal heirs to the 3rd degree	Public sales at auctions, exhibitions and by court order	Increase in value	1-10% for public sales and 10% or 5% for nonpublic sales	Varies with type of work and type of sale	Not collected
CALIFORNIA	Paintings, Sculpture, Drawings and works of art in glass	20 years after death	Heirs, Legatees and personal representatives	Sales at auction or by a gallery, dealer, broker, museum, or agent	Sales price	5%	\$1,000	Collected intermittently
CZECHOSLOVAKIA	All works	Same as for other economic rights of authors	Spouse and children, then parents	All sales	Increase in value	To be fixed by later law	None	Not collected
URUGUAY	All works	Same as for other economic rights authors	Heirs and legatees	All sales	Increase in value	25%	None	Not collected
YUGOSLAVIA	Works of figurative art and manuscripts	Same as for other economic rights of authors	Heirs and legatees	All sales	Sales price	To be determined by self administered agreement	None	Not collected

* All of these laws are inalienable. Based on preliminary survey in Fawcett and material provided by ADAGP and Bild-Kunst.

END

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